

THE CAPITALIST STATE AND PENAL PRACTICE:

THE CASE OF EARLY RELEASE ON LICENCE

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To

Theodora, Electra, and Basil

Declaration

I, the undersigned, declare that this thesis has been composed by myself and that the work is my own. Also that no material or results included in the thesis have been published anywhere, before the submission of the thesis.

Elias Yannikopoulos

Abstract

This thesis constitutes a theoretical and empirical study of early release on licence (parole) as an instance of penal practice, from a perspective which is based on a certain 'radical' problematic derived from the Marxist social theory. More specifically, it tries to explore the ambiguous nature of this penal measure, the inherent antagonism between its liberating (early release) and restraining (on licence) elements, and the conditions under which either element becomes dominant, as well as specify, at various levels of analysis, its main repressive, ideological and other functions and multidimensional importance for both the penal system in general, as a cardinal component of the repressive state apparatus, and the capitalist state itself, as the guarantor of the existing order, the framework of reproduction of the capitalist relations of production, and the basic protector of the ruling and powerful class 'in the last analysis'. However, far from taking early release on licence as an isolated fact of penal practice operating within a social and historical vacuum, as most traditional penological studies, the present work attempts to show that the various types of early release on licence, examined here, have been not only historically linked with certain punishments immediately preceding them, like transportation or incarceration, but also determined by the socio-economic, political and ideological conditions prevailing in certain capitalist societies and states in concrete and historically determinate conjunctions. More than being sociological this thesis is

also historical, not in the sense of studying the development of the 'idea' or the 'institution' of early release on licence from its 'origin' to the present moment, in a linear process of evolution and 'progress', but in the sense of examining concrete types of early release on licence within their concrete penal and social contexts as autonomous and unique objects of analysis. Thus, here are examined: 'ticket of leave' in Australia in the late eighteenth century, 'licence to be at large' as an integral part of the famous Irish Convict system of the 1850s, 'indenture' from the American Houses of Refuge in the 1820s, 'parole' in the Elmira reformatory as an important component of the 'reformatory movement' in post-Civil War America and 'release on licence' in modern Britain as an expression of the 'treatment' ideology and the welfare state. The thesis ends with a critique of early release on licence and penal practice as a whole, and proposes instead of piecemeal penal reformism radical changes in the social structure as the only way of tackling the problems of crime and punishment in capitalist society.

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List of Main Abbreviations

A.C.P.S.: Advisory Council on the Penal System
A.C.T.O.: Advisory Council on the Treatment of Offenders
Am.J. of Soc.: American Journal of Sociology
Am.Soc.Rev.: American Sociological Review
Am.Univ.L.Rev.: American University Law Review
Berk.J. of Soc.: Berkeley Journal of Sociology
Brit.J. of Crim.: British Journal of Criminology
Crim. & Del.: Crime and Delinquency
Crim. Law Rev.: Criminal Law Review
C.J.: Journal of the House of Commons
Corr. Mag.: Corrections Magazine
Fed. Prob.: Federal Probation
H.C. Deb.: House of Commons Debates
H.L. Deb.: House of Lords Debates
H.M.S.O.: Her Majesty's Stationery Office
H.R.A.: Historical Records of Australia
H.R.N.S.W.: Historical Records of New South Wales
J.Cr. Law & Crim.: Journal of Criminal Law and Criminology
J. of Soc.Sc.: Journal of Social Science
J. Res. Crim. & Del.: Journal of Research in Crime and Delinquency
Int.J. of Crim. & Pen.: International Journal of Criminology and
Penology

Law & Soc.: Law and Society
N.A.P.O.: National Association of Probation Officers
Nat.Pr.Ass.: National Prison Association
Nat.Pr. & Par.Ass.: National Probation and Parole Association
N.L.R.: New Left Review
New Soc.: New Society
N.Y.P.A.: New York Prison Association
Pac.Soc.Rev.: Pacific Sociological Review
P.P.: Parliamentary Papers
Scand.St. in Crim.: Scandinavian Studies in Criminology
Soc. Probl.: Social Problems
Un.Penn.Law Rev.: University of Pennsylvania Law Review
Wash.Un.Law Quart.: Washington University Law Quarterly
Yale Law J.: Yale Law Journal

PROLOGUE

This study examines early release on licence as a method of penal practice in the capitalist state. Whereas most of the existing literature has taken an unhistorical and technocratic approach to the analysis of the subject underpinned with a pragmatic bias and a crude empiricism, as if early release on licence operated in a penal and social vacuum, the present work attempts an examination of various types of early release on licence not only in close connection with the prior "base-institutions" immediately preceding them and with the penal control apparatus of the state generally, but also within the context of the specific socio-economic and political conditions of concrete, historically determinate capitalist societies. From this perspective the Australian, the Irish, the American and the contemporary English systems of early conditional release are examined as particular historical "analogies", and not, as in some traditional penological textbooks, as stages in a linear development of this mode of penal practice.

The recently increasing scepticism in regard to the necessity or effectiveness of parole, which is largely a reflection and an effect of a wider disillusionment with the whole "rehabilitative ideal", as well as the actual abolition of parole in some states of America in favour of fixed, determinate sentences, have given early release on licence a renewed interest as a topic of discussion in contemporary penology. Indeed, parole has been under severe criticism here and in America and has been seen as a "tragic failure", practically and theoretically, with a more or less gloomy

future. However, even the abolitionist literature itself serves as a major legitimising factor of the existing penal and social system and as an ideological mystification of imprisonment, since it is mainly informed from a liberal, penal reform perspective which operates in an historical and social void. The present study intends to be a small contribution to the ongoing discussion on the status of parole and tries to examine types of early release on licence within their relevant, concrete and historically determinate penal and social contexts. In this way, it hopefully fills a gap in parole literature, but at the same time claims greater explanatory power and stronger analytical rigour over the atheoreticism and anhistoricism of almost all traditional penological studies.

In the first chapter, a review of the relevant literature is attempted and its main characteristics are depicted, particularly its domination by a pragmatic bias and a concern with administrative efficacy. The traditional and the more recent problematics in criminological and penological thinking are also outlined in an effort to put parole literature into perspective. The review establishes the inadequacy of even most sociological theories to provide a satisfactory methodological tool for analysis of the phenomena of crime, punishment and their functions in society. An alternative model for the explanation of these issues is suggested, which is based on a Marxist analysis of the capitalist state, its nature and its role in the capitalist mode of production. Early release on licence is viewed as a

method of penal control, which is an instance of the repressive mechanism of the state and which operates in a specific economic, political and social context. This theoretical model is expounded in Chapter 2 and, major differences notwithstanding, is founded upon what has been called "new" or "critical" or "radical" criminology, which breaks with the positivist individualism of traditional criminology, and tries, instead, to locate crime and punishment within the social structure of capitalism. In that chapter social formation, mode of production, state, economy, ideology, civil law, criminal law, crime, punishment, prison, early release on licence, their nature, function and their inter-relationship are examined at an abstract level.

In the following chapters various concrete types of early release on licence are examined in particular historically determinate junctures. So, in Chapter 3, "ticket of leave" is examined in connection with transportation to Australia and the colonial policy of the English state in late 18th and early 19th centuries. In Chapter 4, "licence to be at large" as part of the once renowned Irish convict system, introduced and developed in the 1850s and 1860s, is analysed, and its political and ideological functions are portrayed within the colonial context of that island. In Chapter 5, "parole", as developed in America, along with the indeterminate sentence, is examined particularly in relation to the reformatory movement in the post Civil War period. Nevertheless, an earlier analogy is sought in the houses of refuge and the possibility of "indenture" there as a form of early release on licence in the 1820s, while

the even earlier penitentiaries are briefly considered because the absence of early release on licence in them provides a good case of juxtaposition of ideological rationales between them and the houses of refuge. Finally, in Chapter 6, I discuss the ideological background and the *raison-d'etre* of the modern system of release on licence in England in relation to the "treatment" ideology, as well as to the penal policy of the welfare state in a monopoly capitalist society.

The stimulus for the undertaking of this work was given to me in the penological seminars of a nine-month course leading to the Diploma of Criminology in this University, where a serious analysis of the modern system of parole revealed the major ambiguities, conflicting objectives and dilemmas of the system, which recommended parole to me as a fascinating topic of research. My legal background and my total ignorance of the relevant sociological literature compelled me to start my research with a loosely formulated positivist framework, where the "historical development" of parole, as I saw it at that time, would provide an inevitable prolegomenon to the main "empirical" part of my work, which was likely to be an aspect of the actual operation of the existing system of parole probably related to the release criteria or the problems of parole supervision. In the meantime, an increasing acquaintance with some sociological and political literature, and an increasing realisation that the "history" of parole was worth examining as an autonomous subject, compelled me to widen the scope of my analysis and to shift my problematic from a pragmatic, social engineering approach to a critical and historical one.

It has been an established practice among theses writers, academics and authors of every kind to look for a moment backwards when writing a prologue - which is apparently done after the writing of the epilogue itself - and acknowledge gratefully their indebtedness to whomever is due. How could I abstain from this pleasant duty when I would never have done this work without the material and intellectual assistance of so many people? In the relevant footnotes of my thesis I shall try to refer to the numerous scholars who by their own works helped me to find my way in a land that was virgin to me before. To these unknown companions of mine my great gratitude is primarily directed. Also, I am thankful to the State Scholarships Foundation (IKY) of Greece, which with a 3 year scholarship provided the economic backing of the greater part of my studies, and without whose assistance my studies abroad would have been totally impossible. I would also thank them for the great interest and understanding they showed all these years and for the absolute freedom they gave me to work on the topic of my choice in my own way; needless to say that I am alone responsible for what I have written here. I am also grateful to the Law Faculty Postgraduate Studies Committee for generous financial assistance.

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C h a p t e r I

CRIMINOLOGICAL THEORY AND PAROLE LITERATURE

Introduction

Parole literature shares with the other criminological and penological mainstream literature a bias towards pragmatism and policy orientated conclusions, a technocratic perspective, a social engineering approach to the solution of the relevant issues, and an ideological standpoint which is both a-theoretical and an-historical. In particular, as it is exemplified in the numerous predictive and evaluative studies, parole literature is dominated by a concern for administrative efficiency, at the expense of a deeper analysis of both the theoretical foundations of parole and its historical position in concrete penal practices and social systems. This parochialism in penological thinking together with the epistemological positivist individualism of traditional criminology constitute a reflection of their 'scientific' status as ideological enterprises in the service of the existing social order and the capitalist state. Researchers of parole have been, as a rule, major legitimating agents of the prevailing penal practice and social status-quo, by narrowing their views of more general social problems, by distorting the essential nature of issues, and by providing officially acceptable and easily consumable material to the agents of crime control in capitalist society. An outline of the criminological problematic is attempted here in order to put parole literature into perspective and trace out some of its main elements which inform the implicit or explicit assumptions of parole researchers. It must be admitted that the relevant English literature is minimal, if non existent, due to the late introduction of parole here, but a huge amount of literature has been accumulated

in the United States since the early 1920s¹. It is very likely that the interest in parole will be maintained and increased in the near future, after the recent abolition of parole in some American States², as well as the ongoing critical debate on the failure of parole as an instance of the penal practice. More than simply outlining the dominant criminological theory and some newer sociological strands in the discipline³, this chapter attempts to show their inadequacy to provide an analytical tool for the examination of crime and punishment in society, and thus paves the way for an alternative 'framework of analysis' of these phenomena.

Traditional Criminology and Parole Predictive Studies

For more than sixty years criminology has been dominated by a positivist concern with the criminal man⁴. Its epistemological foundation is a crude empiricism, for it takes as its unit of analysis an empirical entity, an easily sensible 'thing', that is the individual man convicted of the violation of a law. It is the sheer fact of his conviction which makes his isolation and study possible, and his differentiation from the bulk of

1. For an extensive bibliography on parole, classified according to subject-matter, see Hawkins, Parole, Cambridge 1969. For particular reviews of parole literature, mainly predictive studies, see Allen, A Review of Parole Prediction Literature, Journal Cr.Law & Crim., v32, 1942, pp.548-554, Schuessler, Parole Prediction, its History and Status, ibid, v.45, 1954, pp.425-431, Mannheim & Wilkins, Prediction Methods in Relation to Borstal Training, London, 1955, Dean & Duggan, Problems in Parole Prediction: An Historical Analysis, Social Problems, Vol.15, 1968 pp.450-458, Martinson, Kassebaum & Ward, A Critique of Research in Parole, Fed. Prob., vol.28, 1964, No.3., pp.34-38.

2. So far parole has been abolished in Maine (1975), Indiana, California Arizona (1977), Illinois and New Mexico (1978).

3. Especially labelling theory and phenomenology.

4. For an excellent critique of earlier and current criminological thinking, see Taylor, Walton & Young, The New Criminology, London, 1973. Also Taylor, Walton & Young (eds), Critical Criminology, London, 1975;

law-abiding people evident to everyone. Having identified in this way the criminal man, traditional criminology enters an unending quest for the possible 'causes' of crime as a type of behaviour. Biological, psychological, constitutional, psycho-analytic, social and other factors have been hailed, either in isolation or in clusters, as 'the causes' of criminality, later to be replaced by others, yet with no better results. The individual criminal becomes the centre of the criminological universe, but loses his human characteristics to become, what has been termed, a 'criminological homunculus'. He is portrayed as a deprived man, lacking this or that attribute. It is claimed that by breaking the law he proved his irrationality, the assumption being that the law and the social order are rational qua law and social order. This man is seen as propelled to criminal behaviour by 'causes' or forces beyond his control, a state of things which begs for remedial action to restore the individual to a law-abiding status. The hard determinism of positivist criminology is not quite in accord with actual practice, where the criminal man is generally treated as a rational and responsible person, but, as a principle, correctional measures reflect and sustain the criminological notion of the deprived, pathological individual within a healthy and intrinsically good social order. Thus dominant criminology opts for a reification of the law; it holds it as an unproblematic variable embodying the common values of society to which the criminal minority have showed

C. Sumner, Ideology and Deviance, unpubl. PhD Thesis, Sheffield Univ. 1976, A. Scull, Decarceration, Engl. Cliffs, N.J. 1977 (esp. Ch.1), P. Young, Deprivation, Inequality and Crime, Unpubl. paper, Edinburgh, 1978

their disregard. Thus, it opts for a reification of the state, which creates laws, and therefore it eschews any involvement with the analysis of the social relations which are expressed by and through the state. To separate the study of crime from the workings and theory of the state has been a 'notable accomplishment', as Matza put it⁵, of the positivist criminologists, and this is supposed to be the 'apolitical' nature of criminological research.

The search for causes of criminality has focused upon the external or internal attributes of the particular individual, or some environmental or societal factors, as they affect, and are mediated through, the individual. Concepts like family relations, poor housing, unemployment and so on, are treated as isolated instances, not perhaps as symptoms of a larger social disruption, in a way that the social structure is fragmented in a series of 'scattered milieux' and society is turned into 'a conceptual flat-land'. At the level of penal policy, these environmental 'causes' have pointed to the need for social amelioration of particular isolated areas or relations in society; thus they recommend piecemeal reform rather than radical change of the social structural pattern which generates or fosters such phenomena. It is in this sense that R. Quinney remarks that:

Criminology - as the scientific study of crime - has served a single purpose: legitimation of the existing social order. The established system has been taken for granted; departures from and threats to social order have been the objects of investigation. In the name of developing knowledge about crime, most criminologists have supported current institutions at the expense of human freedoms and social revolution⁶.

5. D. Matza, Becoming Deviant, New York, 1969, pp.143-144.

6. R. Quinney, Critique of Legal Order, Boston, 1974, p.26.

The unrewarding and arduous search for 'causes' in criminology finds its counterpart, within parole literature, in the prediction studies which are largely based on a similar causative discourse⁷. It is assumed that whatever caused criminality in the first place is likely to cause it again under the same conditions, allowing of course for the fact of the potential parolee's period of incarceration. Predictive studies constitute the bulk of parole literature, and no less than six hundred works have been published from 1923 to 1967, according to one bibliography⁸. Although recently parole prediction lost its popularity, the 'predictive obsession' dies hard. What is important to emphasise from the beginning is that the attempts to predicting proved as futile as the search for causes of criminality, and that 'in spite of the voluminous research and the sophistication of the most recent efforts, there has been no appreciable increase in predictive power'⁹. The objective of these studies is to predict, that is to say to 'prophesy' or forecast, the probabilities existing for a prisoner to become a 'success' or 'failure'

7. The most outstanding studies are: Warner, Factors Determining Parole from the Massachusetts Reformatory, J.Cr.L.&Cr., V.14, 1923, pp.172-207, Hart, Predicting Parole Success, J.Cr.L.&Cr., V.14, 1923, pp.405-414, Burgess, Factors Determining Success or Failure on Parole, in Bruce et al., The Workings of the Indeterminate Sentence Law and the Parole System in Illinois, 1928, pp.205-249, Sh. & El. Glueck, 500 Criminal Careers, New York, 1930, G. Vold, Prediction Methods and Parole, 1931, Tibbits, Success and Failure on Parole can be Predicted, J.Cr.L. & Cr., V.22, 1931, pp.11-50, L. Ohlin, Selection for Parole, 1951

8. Savitz, International Bibliography on Crime and Delinquency, vol.2, 1967, pp.495-537.

9. Dean & Duggan, Problems in Parole Prediction, loc.cit., p.458.

on parole, whatever the meaning of these terms. This is done by utilisation of previous experience and statistical manipulation of this experience on the line of actuarial practices. That is why the tables resulting from this enterprise are sometimes rightly called 'experience tables'. Also since prediction is rather an expectation than a certainty, they are very often called 'base expectancy tables',¹⁰. What is of interest from our viewpoint is not to remain upon the methods, technicalities and statistical mathematical sophistication of these tables, but on the contrary, to underline the pragmatism of such exercises, and the great potential that such devices may be used by the authorities as instruments in operating a better, more effective and more rationalised parole administration.

Indeed, one of the main characteristics of parole decision-making is its discretionary nature, the denial or grant of parole on a selective basis according to criteria never explicitly disclosed. The lack of statutory criteria or their abstract vagueness compel the paroling authorities to use their own. One, and it seems the predominant among them, is the amount of 'risk' each individual poses, that is the smaller or greater likelihood that if released early he may violate the conditions of parole. This being the real 'crux' for a paroling authority, prediction tables are proposed as guides for action¹¹. It must not be thought that these tables are

10. Hayner, Why Do Parole Boards Lag in the Use of Prediction Scores? Pacif. Soc. Rev., Vol.73, 1958, pp.1ff, Erjen, Current Thinking on Parole Prediction Tables, Crime & Delinq., Vol.8, 1962, pp.215ff, Hoffmann & Goldstein, Do Experience Tables Matter?, J.Cr.L. & Cr., Vol.64, No.3, 1973, pp.339-347.

accurate and faultless counsellors. On the contrary, they have been under severe criticism on various grounds; so, it has been shown that they do not provide a standard for selection, that they are based on rather static and usually pre-prison factors and, most importantly, that they do not predict¹². Even so, prediction studies illustrate in the clearest way how criminological knowledge takes as its subject matter administrative concerns and puts its expertise in the service of short-run technical aims of bureaucratic, organisational business. Nowhere else have the criminologists put themselves systematically into such a 'handmaiden' position vis-a-vis the state, in the field of parole, as in the predictive studies.

It is true that their services are not always honoured, but this is not their fault. Surprisingly, no state in America uses prediction tables either as an auxiliary device or as the main tool, except California, Illinois, Massachusetts, Minnesota, Washington and Wisconsin. In Britain, however, the Home Office makes extensive use of Base Expectancy Scores since 1969, in the sense that offenders with scores of 35% (50% after 1972) are considered as low 'risks' and most of them are referred to the Parole Board without prior recommendation of the Local Review Committees. Nevertheless, prediction tables are not used either by the Local Review Committees or

11. See O'Leary & Glaser, the Assessment of Risk in Parole Decision Making, in D.J. West (ed), The Future of Parole, London, 1972, pp.134-198. From the vast literature on the parole criteria see K.O. Hawkins, Parole Selection: The American Experience, unpub. Ph.D. Thesis, Univ. of Cambridge, 1971, R.O. Dawson, The Decision to Grant or Deny Parole: A study of Parole Criteria in Law and Practice, Wash. Univ. Law Quart., 1966, pp.255-295.

12. For a general review of such criticisms see Sutherland & Cressey, Criminology, 8th ed., 1970, p.601.

the Parole Board. The actual utilisation of these techniques notwithstanding, prediction studies illustrate the willingness with which researchers put their intellectual talents to the management of the existing administrative arrangements, indifferent to the implications of their work. Their 'technocratic' approach reduces wider social problems to mere technicalities and so the scholars degenerate into calculating machines of sheer numerical combinations.

The 'technocratic' approach in parole literature is even more evident in numerous 'peripheral' studies on prediction, that is works which try to refine, adjust, amend, validate or invalidate, defend or reject particular prediction methods and techniques, thus accumulating a great amount of relevant information and feeding it back to interested persons and agencies in a 'recycling' process which reinforces the technicalistic nature of the master works. If parole prediction students are servants to the state, these particular students are servants to the servants, which implies a lot for their supposedly 'objective' academic stance¹³.

As we have already seen, the theoretical assumptions of parole prediction are founded on a causative discourse and correspond directly to positivist criminological concerns with the 'causes' of criminality. Although prediction and causation are not tantamount, as sometimes predictive factors

13. See for example Hakeem, The Validity of the Burgess Method of Parole Prediction, Am.J. Soc., v.53, 1948, p.376, Ohlin & Duncan, A Comparison of Alternative Methods of Parole Prediction, Am.Soc.Rev., v.17, 1952, p.268, Tibbits, Reliability of Factors used in Predicting Success or Failure on Parole, J.Cr.L.&Cr., v.22, 1932, p.844, Lanne, Parole Prediction as Science, J.Cr.L.& Cr., v.26, 1936, p.377, Goodman, The Use and Validity of a Prediction Instrument, Am.J.Soc., v.58, 1953, p.503 and numerous others.

are broader than separate causes, prediction research cannot totally disregard the idea of causation as 'a completely redundant concept'. Every predictor is not a cause, but as H. Mannheim pointed out they are closely inter-related:

... since in our original selection of potentially predictive factors, i.e., at the stage before the tables are constructed, we are consciously or unconsciously guided by certain views on causation¹⁴.

Under these circumstances the criminal individual - now a potential parolee - becomes once more a centre of the universe and a 'homunculus' for parole research, in its arduous task to isolate the likely predictors of 'success' on release. Every thinkable and possible condition, trait or attribute has to be taken as a possible factor. Indeed, in earlier studies, neither height nor weight were excluded, until a reliable low correlation between them and parole 'success' or 'failure' was found¹⁵. Really, one can never be sure that the factors one uses are the only factors possible, in other words that one has exhausted all likely predictors. Different researchers locate their predictors in different areas; depending on their philosophy, idiosyncrasy and social position they identify or emphasise this or that factor, and this has a direct effect on the predictive power of the prediction table, as well as its construction. In any case, predictors have been drawn out of easily accessible information in the criminal records, whilst 'success' and 'failure' on parole have been defined as the general penal policy and the official rhetoric used to define them. Again, multifactorial analyses isolated

14. H. Mannheim, Comparative Criminology, London, 1965, p.145

15. See G. Vold, op.cit., and criticisms by M. Hakeem, The Validity... loc. cit.

numerous, and sometimes contradictory, factors revolving around the particular individual or his immediate environment, as this was mediated through the individual, but in the context of an unproblematic social structure. In this way law, the state, even the existence of parole itself have never been envisaged as independent variables, a fact which has led to the one-sided development of parole research and its fundamentally technocratic status.

The Guidelines of Parole

From the contemporary studies on parole we single out a major collective work of three American scholars epitomised in their article 'Making Paroling Policy Explicit'¹⁶. This work is characteristic of the unbroken continuity in the technocratic tradition in penology, and has been proved of such pragmatic importance for parole, that it has already led to the overthrow of the established role of parole boards as decision making bodies. One usual criticism levelled against parole is the lack of explicit criteria of policy, which renders parole boards open to such characterisations as

16. Gottfredson, Hoffman, Sigler & Wilkins, Making Paroling Policy Explicit, Crime & Delinquency, v.21, 1975, pp.34-44. For an extensive analysis and critique of these Guidelines, see Genego et al., Parole Release Decision Making and the Sentencing Process, Yale Law J., v.84, 1975, pp.810-902. For a critique of the method of construction and for the ideological basis of the 'Guidelines' see J. Schmidt, Demystifying Parole, Ph.D. Thesis, Univ. of Cal. at Los Ang., 1976. We must note, however, that the Guidelines constitute a break with 'rehabilitation', since the criteria for parole release they comprise are both made explicit and not reflecting response to correctional treatment. In this way they collapse one of the fundamental justifications of parole (parole given at the 'optimal point' of a prisoner's life). So far Guidelines are used or are likely to be used soon in sixteen American States. See K. Krajick, Parole: Discretion is Out, Guidelines are In, Correct. Magaz., vol.4, 1978, pp.39-45.

arbitrary, tyrannical and so on. This group of researchers, in the early 1970s, after close examination and codification of the previous policy of the Federal Parole Board in the United States, formulated a type of minimum serviceable period for certain categories of prisoners, which both made the previous implicit policy of the parole board explicit and allowed everyone, even the prisoner himself, to know from the early beginning the approximate period of his incarceration. The practical ramifications of such a technique for the operation of parole today cannot be overestimated. The 'Guidelines of Parole' as they are called, are based on three elements:

a) severity of offence; b) score of a list of eleven 'salient' factors and c) a range of time to be served. An examination of these factors reveals that the Guidelines break with individualisation and rehabilitation, which is a new step, but at the same time belie their supposedly scientific 'objectivism'. Crime is taken as given, the 'salient' factors are a codification of previous similar predictive studies, while the length of time to be served is determined by the previous practice of the parole board. The Guidelines purport to rationalise and objectify the policy of release, to immunise parole boards from criticisms of arbitrariness, and thus prevent disruption at the administrative level, as well as promote the smooth functioning of the system. The system as such is not questioned, but its routine is likely to be rationalised by a more 'scientific' rather than 'clinical' approach to selection. They try to achieve a 'fair' equalisation of sentences. Yet, as the researchers claim, this 'fairness' will be attained 'within the model' (the

emphasis is theirs), meaning of course that the model itself is not necessarily 'fair'. What is meant by 'fairness' in this respect? It is meant, they suggest, that 'similar persons are dealt with in similar ways in similar situations. Fairness thus implies the idea of similarity and of comparisons ... as the sample of similar persons increases, similar treatment among that sample becomes more likely to be regarded as fair. The idea of fairness thus becomes closely related to statistical concepts of similarity and sample size'¹⁷. The apotheosis of positivist quantification and statistical manipulation explicit in this statement of philosophy cannot obscure the ideological assumption behind it and the moral agnosticism of its authors. Fairness is conceptualised in statistical and not in social terms and therefore hangs in a historical vacuum. It is not considered that, possibly, dealing with a number of people in similar ways under similar conditions does not necessarily justify 'dealing' itself in the first place. Having reified social control in advance, they tried to make the paroling policy explicit, but in the meantime they left their own ideological assumptions implicit. Analysing the aims of the project they suggested that their purpose was:

to develop, test and demonstrate programmes of improved information for decision-making by providing objective, relevant information for individual case decisions and by summarising experience with parole as an aid to improved policy decisions ... and to aid paroling authorities in rational decision making for increased effectiveness of prison release procedures¹⁸.

17. Ibid, pp.34-35 (their own emphases)

18. Gottfredson et al., Parole Decision Making: Summary, N.C.C.D., June 1973, ii, p.18.

In this way, they tried to rationalise the administration of parole and help its smooth functioning. It is in this sense that the criminologists have been called 'the ancillary agents of power'. As R. Quinney observes from a wider viewpoint:

(the criminologists) provide the kinds of information that governing elites use to manipulate and control those who threaten the system. As 'experts' criminologists inform the managers of social order...¹⁹.

'Objectivity' and Policy-orientation in traditional criminology

At this point it is necessary to reason for a while about two inter-related issues that came out of this review of parole literature and whose ramifications are immensely important for all social science, indeed for every intellectual exercise: the issue of objectivity and the issue of policy-orientated studies. The first concerns the extent to which science and particularly social science can be value-free. The controversy and debate between Becker and Gouldner is too well known to be repeated here, especially since the unfolding of my criticism of parole literature has touched the issue many times above and explicitly placed me on Gouldner's side²⁰. When science, like physics or biology, which revolve around such empirical units as matter or cell and the like are coming under increasing criticism for their lack of objectivity, to talk about abjectivity in the social sciences, like sociology, which centres around 'concepts' supposed to be 'social facts'

19. R. Quinney, op.cit., p.27.

20. See particularly H.S. Becker, Whose Side are we on, Soc.Problems, vol.14, no.3, 1967, pp.239-247, and A.W. Gouldner, Anti-Minotaur: The Myth of Value-free Sociology, Soc.Probl., vol.9, 1962, pp.199-213, and other articles on the issue found in J. Douglas (ed), The Relevance of Sociology, New York, 1970. For a general discussion see also G.Myrdal, Objectivity in Social Research, London, 1969 and from a wider perspective Martin Shaw, Marxism and Social Science, London, 1975.

is at least misplaced. Gunnar Myrdal warned that:

We are under the influence of tradition in our sciences, of the cultural and political setting of our environment and of our peculiar personal make-ups²¹.

The researcher cannot be separated from his work; the work reflects something of the values and the personality of the author, not only in its original conception and undertaking but also 'in the selection of relevant data, the recording of observations, the theoretical and practical inferences drawn explicitly or implicitly, and the manner of presentation of the results'²². The nature of the questions posed are in some way or other connected with our view of the world, and therefore they affect the objectivity of our study. As the same thinker had observed in an earlier work:

There is an inescapable a priori element in all scientific work. Questions must be asked before answers can be given. The questions are all expressions of our interest in the world; they are at bottom valuations. Valuations are thus necessarily involved already at the stage when we observe facts and carry on theoretical analysis, and not only at the stage when we draw political inferences from facts and valuations²³.

Criminology and penology traditionally claim to be 'scientific', meaning primarily 'objective'²⁴, but the questions they ask at the very beginning are taken either from the official version of reality or from a particular point of view regarding society,

21. G. Myrdal, op.cit., pp.42-43.

22. Ibid.

23. G. Myrdal, The Political Element in the Development of Economic Theory, London, 1953, pp.ix-xvi.

24. See for example the recent textbook, L.P. Carney, Introduction to Correctional Science, New York, 1974 where it is suggested that 'the scientific attitude is a predispositional state that excludes emotional value judgments. The scientist's attitude (predisposition) when he is acting in his role of scientist is one of complete objectivity and ethical neutrality' (p.3). The same author defines criminology as essentially consisting of 'the scientific study of crime, criminals and criminal behaviour and the methods of control and treatment of these phenomena' (p.5).

social order, crime, punishment and so on. Criminology has been called the science 'concerned with the immediate application of knowledge to programmes of crime control'²⁵. But by opting for 'crime control', and therefore 'social order', the criminologist is no more a value-free intellectual, and if he says so he distorts his valuations to seem as reasoned inferences. R. Quinney points out that 'the social sciences have always been the servants of the established society. Indeed, the very emergence of the social science was a reaction to social and political change'²⁶. This 'search for order' that characterises the overwhelming majority of criminological literature gives it an a priori subjectivist relativism.

Claims to objectivism in criminology are but ideological mystifications of the existing order, in the service of that order.

On the other hand, the proliferation of policy-oriented studies in the field of criminology, as in the area of parole, can be explained by the position of academic research within the modern state and the demand of this state for readily applied pragmatic research for the solution of the short-term problems that result from its operation. The modern monopoly capitalist state, known as the welfare-warfare state, utilises to the utmost its intellectual resources and harnesses them

25. Sutherland & Cressey, op.cit. p.3 (my emphasis). L.P. Carney, sees corrections as 'the funnel through which the results of the scientific inquiries of criminology are applied, or as 'the professional discipline which applies the knowledge of criminology to the control and treatment of criminally deviant behaviour', op.cit., p.5.

26. R. Quinney, From Repression to Liberation: Social Theory in a Radical Age, in Scott & Douglas (eds), Theoretical Perspectives on Deviance, New York, 1972, p.318.

to the service of its objectives²⁷. In a utilitarian state like this, 'social theory 'for its own sake' or pure social theory is always vulnerable and of challengeable legitimacy'²⁸. The close dependence of academics upon the state or other semi-official institutions not only for funds but also for the preservation of the privileges of the academic career and its paraphernalia, means that there is likely to be 'an operational degree of consensus and agreement' between government and academics, as a general rule²⁹. This is not to suggest that in a sense the researchers are 'sold out' or 'bribed' against their will by the state and its agencies. More often than not 'there are a large number of academics who are not only willing to do 'agency-determined' research, but also share the 'agency's' perspective on the problem to be studied'³⁰. There is no secret 'conspiracy' between state and criminologist in every case. Usually, the class position and the social environment within which he lives and works mean that the criminologist shares the dominant ideological hegemony; this is not 'bad' in itself, but has to do with his alleged 'objectivity'.

In the United States huge amounts of money are provided

27. For an analysis of this issue see generally A.W. Gouldner, The Coming Crisis of Western Sociology, London 1971. For the state of 'scientific research' proper in modern society see St.S. Blume, Toward a Political Sociology of Science, New York, 1974.

28. Gouldner, op.cit., p.82.

29. See the comments of P. Wiles in the Introduction to P. Wiles (ed), Crimes and Delinquency in Britain, 2, London, 1977.

30. A.M. Platt, The Politics of Riot Commissions 1917-1970, New York 1971, p.29.

every year for research projects. In 1968 the relevant Institute was authorised to make grants and give contracts for 'the development of new or improved approaches, techniques, systems, equipment and devices to improve and strengthen law enforcement',³¹. At the federal level the Law Enforcement Assistance Administration was created in 1968, with an annual Congressional appropriation of \$63m. The budget increased to \$268m in 1970, to \$529m in 1971, to \$1,150m in 1972 and to \$1,750m in 1973. The 'mission' of this organisation, as stated by its administrators, is 'to reduce crime and delinquency',³².

In this country, the need for more 'expert' information has been legally recognised since 1948 when the Home Secretary was given the right to grant financial resources for criminological and penological research³³. More knowledge, it was again officially expressed, constitutes a necessary prerequisite for dealing with the problem of crime:

Delinquency cannot be dealt with effectively without more knowledge of its causes and a more accurate measurement than we have at present of the success of the various forms of treatment. It is now widely recognised that in this field research is as essential as in the fields of science and technology³⁴.

This in a way underlined the 'technocratic' ethos expected from the experts in the field. More than that, the same official document projected the idea of an institution which could

31. Under the Omnibus Crime Control and Safe Streets Act of 1968

32. LEAA, 3rd Annual Report, Fiscal Year 1971, Wash. D.C., 1972

33. By the Crim. Justice Act 1948. In 1964 over £80,000 were given for research work in universities. See White Paper, The War Against Crime H.M.S.O., London 1964, para. 26.

34. White Paper, Penal Practice in a Changing Society, H.M.S.O., London 1959, para. 17.

co-ordinate and guide criminological research in all fields, serving as a focus of 'constructive thinking' about delinquency. In 1960 the Institute of Criminology in Cambridge was established which, according to the Home Secretary of the time, became 'a true centre for the interchange of information on criminological matters',³⁵. Three years earlier, in March 1957, the Home Office Research Unit was founded formally, on the explicit purpose 'to give the Home Office day to day criminological advice which, while scientifically detached is based on a commitment to Home Office interests'. But, as its Director admitted: 'it is true that to preserve scientific integrity while acting as a servant to the Secretary of State has never been easy',³⁶. Criminological literature in general and parole literature in particular give ample evidence that to do this while acting as a servant to the State has not been much easier.

Evaluative and Abolitionist Literature

While predictive studies try to 'guess' the 'likelihood of 'success' or 'failure' of a potential parolee, another category of parole studies try to assess and evaluate the 'success' or 'failure' of the parole system as a whole³⁷. Parole success has been traditionally assessed from the viewpoint of

35. For the background of the matter and the objectives of the new Institution see Butler, The Foundation of the Institute of Criminology in Cambridge in Hood (ed), Crime, Criminology and Public Policy, London, 1974, pp.1-10.

36. See T.S. Lodge, The Founding of the Home Office Research Unit, ibid, pp.11-24.

37. For an extensive review of the evaluative studies and an assessment of the effectiveness of parole, see Lipton-Martinson-Wilks, The Effectiveness of Correctional Treatment, New York, 1975.

success on parole, so as to talk about a successful parole system when the rate of those not violating the law on their release, compared with that of those violating the law or their conditions, was high. The main element of these studies, therefore, is a concern with reconviction rates which again, as easily observable facts, (not to speak of hidden or un-noticed violations) point to the fundamental empiricism of this type of literature as well. The intrinsic difficulty of measuring parole violation rates is aggravated by differences in definitions of what constitutes 'violation', as well as by the inclusion of certain intermediate categories between 'extreme success' and 'extreme failure' suggested by some more sociologically orientated researchers. Furthermore, in evaluating parole only the period of parole has been considered, while other studies have followed up parole release for a number of years. This area of research is dominated by the work of the Gluecks, who followed up a group of 500 young adult offenders for a period of fifteen years, and 1000 juvenile delinquents for over 10 years! Other studies compared the subsequent careers of groups of prisoners released on parole with the subsequent careers of groups released without parole. Furthermore, since parole operates as a continuation of prison, many studies combine the examination of parole with that of penal institutions, while in some cases particular types of 'treatment' within the prison have been assessed through parole outcome³⁸. From a

38. See in particular D. Glaser The Effectiveness of a Prison and Parole System, Indianapolis, 1964. Also Kassebaum, Ward & Wilner, Prison Treatment and Parole Survival, 1971 where the effect of 'group counselling' on parole success is assessed. See also R. Hood & R. Sparks Key Issues in Criminology, London, 1970, especially ch. 6,7,8 for a review of the main evaluative studies of parole.

wider perspective, some studies on parole assess its success by other criteria rather than the reconviction rate, like the extent to which parole is integrated within the penal system, its relation to the other agencies of the criminal justice system, the extent of its acceptance by the public and so on³⁹.

The type of evaluative studies we are describing here is predominantly inspired and presented from a liberal reformist approach which implies a prescriptive stance towards the system in question and allows for critical commentation, identification of defects or weaknesses, and even for alternative proposals or modifications in the existing system. The type of study which predominates in the British empirical literature on parole is of an evaluative character⁴⁰. The barrage of criticism directed upon the new system from the first moment it was launched, not from a hostile camp, but from men who accepted the system in the first place and liked to see it 'better', according to their own estimate of what is a good, effective and efficient system. Their criticisms and the proposed reforms and changes, marginal or more substantial, never did threaten the existing system, which was rather helped to adjust to new needs or new requirements, and therefore both buttressed and legitimised. What is characteristic of the liberal

39. D. West (ed), The Future of Parole, London 1972, D.A. Thomas (ed) Parole, Its Implications for the Penal and Criminal Justice System, Cambridge 1974. See also Morris & Beverly, On Licence, Chichester, 1975.

40. A. Samuels, Parole, A Critique, Cr.L.Rev., 1969, p.459. J.E.Hall-Williams, Natural Justice and Parole, Cr.L.Rev., 1975, p.82 and 125 (two articles). Selection of articles in British Journal of Criminology, Vol.13, 1973 (issue dedicated to parole). D.J. West, Board on Parole, New Society, June 15, 1972

reformist criminologist is his pluralism of perspectives in form and content and his lack of 'a coherent or systematic account of the workings of the total society',⁴¹. He opts for a piecemeal reform in society rather than for a radical change. In this way, his intellectual activity cannot transcend the present and the existing structure of economic and social arrangements. From a liberal standpoint one could well propose even the abolition of an institution if in one's opinion it thwarts or impedes the smooth functioning of a broader organisation. It is not surprising, therefore, that from such a standpoint parole comes today under merciless attacks, and proposals are made for its abolition⁴². Parole, having been connected ideologically with the rehabilitative ideal takes, increasingly nowadays, a share in its criticisms. The actual abolition of parole and indeterminate sentence in certain States of America is presented as a radical departure from the existing penal practice. However, considering that such an abolition of parole is going to leave the prison system intact, it seems that from a broader viewpoint this does not sound so radical. Without examining the nature of

41. According to Taylor, Walton & Young (eds), Critical Criminology, London, 1975, p.23.

42. In recent years an increasing flow of studies, memoranda and commentaries favour abolition of parole. Among others see American Friend Service Committee, Struggle for Justice, N.York 1971, R.A. McGee, A New Look at Sentencing, Part I, Fed.Prob., Vol.38, June 1974, pp.3-8 and Part II Sept. 1974, pp 3-11, Citizens Inquiry on Parole and Criminal Justice, Prison without Walls, N. York, 1975, Schwartz, Let's Abolish Parole, Reader's Digest, Aug. 1973, p.189, N. Morris The Future of Imprisonment, Chicago Univ. Press, 1974 (not outright abolition of parole but his proposals are likely to radically alter the functions of parole boards, when parole date is determined 'within the first few weeks' of the inmate's imprisonment), Kastenmeier & Egli, Parole Release Decision-making: Rehabilitation, Expertise and the Demise of Mythology, Am.Un.L. Review, Vol.22, 1973, pp.477-525, D.T. Stanley, Prisoners Among Us, The Brookings Instit., Wash.D.C. 1976. See also Office of the Governor, Press Release, Illinois, Feb. 18, 1975, Staff Report Prepared for the Commission on Parole Evaluation Techniques and Rehabilitation, Connecticut Univ. Sept.1,1975. For a critique of the system of parole see the Epilogue of this thesis.

parole as an instance of the penal practice, and without setting both within the context of the structure of a society, the endeavour is likely to provide nothing more than a 'smoke-screen' over the wider issues related to crime and punishment in our society. One of the most sharp critiques of parole is framed in a 'reformist' language:

Parole is an idealistic concept. It seeks simultaneously to protect the public and to give the criminal offender a new chance. But these noble purposes have not been realised. Parole is a tragic failure. Conspiring with other elements of the criminal justice system - unnecessary pretrial detention, over-long sentences, oppressive prison conditions - it renders American treatment of those who break society's rules irrational and arbitrary⁴³.

In the quotation just given it is implied that parole has not lived up to its expectations and, along with other 'irrational and arbitrary' elements, should disappear from an otherwise 'rational' and 'just' criminal justice system. The role of the criminal justice system in the protection and reproduction of the established social, political and economic relations is not envisaged. It has been taken as a non-independent variable. Hence the fundamentally legitimating function even of the abolitionist literature itself.

Sociological Theories of Deviance and Parole

In the following section we shall briefly refer to some sociological theories which have had a direct or indirect effect upon the formulation of hypotheses and frameworks for the analysis of various aspects of parole, as an illustration of the fusion of criminological and penological thinking. Labelling theory is widely regarded as a progressive step,

43. Citizens' Inquiry, op.cit., p.xviii (our emphasis)

for it moved the focus of study from the criminal man to the social process by which an act is labelled as criminal or deviant⁴⁴. The deviant man is seen as the victim of the intervention by the control agencies, like police or courts, an intervention which may 'amplify' deviance instead of curbing it⁴⁵. The ramification of this statement for penal policy is that the less the agencies of social control react to criminal acts the better, a position which has been characterised as 'radical non-intervention'⁴⁶. From a slightly different viewpoint, labelling theorists are interested in the unintended consequences of the various social control agencies and punishing institutions in their everyday operation and their encounters with deviants. In the parole literature this approach has been used as a method of examination of the extent to which 'success' or 'failure' on parole is not a result of inherent attributes of the parolee, but also, or perhaps solely, the result of the everyday interaction between parolee and parole officer, as well as between parole officer and his agency. The failing parolee is then portrayed as an 'organisational reject', victim of differential law enforcement⁴⁷.

44. The basic tenets of this theory are found in H.S. Becker, Outsiders, N. York, 1963, idem. (ed), The Other Side, N. York, 1964 and Lemert, Human Deviance, Social Problems and Social Control, Englewood Cliffs, N. Jersey, 1967. For a review of the relevant literature see E. Schur, Labelling Deviant Behaviour, N. York 1971 and W.R. Gove, The Labelling Perspective; An Overview, in W.R. Gove (ed), The Labelling of Deviance, N. York, 1975, pp.3-20. For critical comments see E. Schur, Reactions to Deviance, Am.J.Soc. vol.75, 1969, pp.309-322, R. Akers, Problems in the Sociology of Deviance, Social Forces, vol. 46, 1968, pp.455-465, J. Gibbs, Conceptions of Deviant Behaviour, Pacif. Soc. Rev., vol.9, 1966 pp.9-14.

45. L. Wilkins, Social Deviance, London 1964, J. Young, The Role of Police as Amplifiers of Deviancy, in S. Cohen (ed), Images of Deviance, (Penguin), 1971, pp.27-61, A. Cicourel, The Social Organisation of Juvenile Justice, N. York, 1968 and numerous others.

On the other hand, phenomenology is fundamentally individualistic and examines the process by which an understanding of the world is possible⁴⁸. It tries to find the special meaning a certain act or phenomenon has for a certain individual. Some studies on parole use phenomenological, socio-psychological and other approaches in order to examine the views, opinions, attitudes, values and the like, of parolees or potential parolees⁴⁹. In the first major empirical work published in Britain the researchers discriminated in favour of parolees by soliciting, through four interviews, their viewpoints, the reason being that, as they explained, 'their voice is so rarely heard when decisions are made regarding penal policy'⁵⁰. An earlier sociological study hypothesised on the likely outcome of parole with such variables as prisoner's outlook and motivations⁵¹.

Having examined these two theoretical approaches, we shall discuss cursorily their main inadequacies, which discourage the possibility of a rigorous approach to crime and punishment being based on their problematic. Labelling theory is right

46. For an excellent analysis of this approach as regards juvenile delinquency see Shur, Radical Non-Intervention, Engl.Cliffs, N.Jersey 1973.

47. See Takagi & Robinson, The Parole Violator: An Organisational Rejection in Journal of Research in Crime & Delinq., vol. 6, 1969, p.78. Gottfredson & Ballard, Differences in Parole Decision Associated with Decision Makers, ibid, vol.3, 1966, p.3.

48. The basic tenets of this theory are found in the various works of A. Schutz and especially, A. Schutz, The Phenomenology of the Social World, Northwestern Un. Press, 1967. For discussion on the theory see Taylor, Walton & Young, The New Criminology, esp. ch.6, M. Phillipson, Sociological Aspects of Crime and Delinquency, London, 1971, M. Phillipson & M. Roche, Phenomenological Sociology and the Study of Deviance in Rock & McIntosh (eds), Deviance and Social Control, 1973.

49. A major contribution to the examination of the prisoner's understanding of parole is made by the work of Irwin, The Felon, Engl. Cliffs, 1970, esp. ch. 5-7.

in emphasising the cardinal importance of social control in the creation of deviance, but it holds too a highly fragmented picture of it. This theory loses sight of the wood for the trees; in other words, it treats social control as a series of control agencies, the interaction taking place mostly interpersonally and mainly between the deviant and the lower echelons of caretaking institutions. The fact is never examined that the distribution of power, as well as social control, is structured and patterned in our society, where some can label while others can only be labelled. The macro-structure of state power has vanished in a myriad of episodic instances.

The other approach suffers from the same but more severe inadequacy. By opting for open subjectivism and absolute relativism, phenomenology is a type of intellectual navel-gazing. By bracketing off society, it determinately collapses any notion of social structure. Yet, meaning is not autonomously created but is relevant to the particular context in which the subject is situated and acts or thinks or theorises, even if he is not conscious of that. As R. Lichtman observes 'the world is understood through intended meaning, but this meaning is in turn shaped and misshaped by the world'⁵². As he also

50. Morris & Beverly, op.cit., (preface).

51. J. Skolnick, Towards a Developmental Theory of Parole, Am.Soc.Rev. v.25, 1969, p.542.

52. R. Lichtman, Symbolic Interactionism and Social Reality: Some Marxist Queries, Berkley J. of Soc., v.15, 1970-71, p.78.

stresses:

The channelling of interpreted meaning is class-structured. It is formed through lived engagement in the predominant class-controlled institutions of the society⁵³.

Other sociological theories, like 'anomie', 'delinquent opportunity' and 'subculture', which sometimes have had a bearing on criminological thought and on the formulation of hypotheses on various aspects of parole⁵⁴, suffer from the same inadequacies: either their problematic is ultimately expressed in individualistic terms, like Merton's typology of modes of individual adaptation to the state of anomie⁵⁵, or they trivialise their structuralism in middle-range analyses of the opportunity structure, and therefore do not examine the social structure and its fundamental contradictions, whose the 'anomic' situation and the prevailing inequality of opportunity are but symptoms and reflections⁵⁶.

Towards an Alternative Approach

It is evident then that neither positivist criminology nor more sociologically-oriented theories of deviance constitute an adequate and rigorous framework of analysis of the phenomena

53. Ibid, p.79. We shall see in the next chapter how the ideological apparatuses of the state shape meaning in a capitalist society.

54. As an illustration we refer to Morris & Beverley, op.cit., who construct their hypotheses upon no less than the following theories: opportunity theories of Merton, Cloward etc., concept of 'prisonisation' of Clemmer, interactionist theories of Mead, theory of 'self-concept' of Reckless and aspects of Glaser's work on the reformulation of Sutherlands theory of differential association! Of course there remains the problem of how this variety is able to constitute one more or less integrated analytical framework. For a similar criticism see Bottoms, The Place of Parole, in Times Lit.Supp., 26 Sept. 1975, p.1100

55. Merton, Social Theory and Social Structure, N. York, 1957

56. For a general critique of all these theories see Taylor, Walton & Young, op.cit.

of crime and punishment in capitalist society. What is needed is a macro-sociological and historical analysis of these phenomena⁵⁷, which will tie them up with the very conditions of existence of particular, historically determinate social structures, in a certain moment of their development. In other words, what is lacking is a model which, like Durkheim's, will establish the social nature of crime and punishment in general, but, unlike Durkheim's, will emphasise the historical specificity of concrete social contexts in specific, historically concrete conjunctions⁵⁸. It is proposed that such a model can be drawn from the general Marxist theory of historical materialism, and can provide a useful tool of analysis. Moreover, apart from being macro-sociological respecting historical specificity this model will constitute a means of social criticism and demystification of the existing social order, instead of reifying it or considering it as based upon the common 'consensus' of the whole society, as most positivist and functionalist theories. In other words, it will include a critical outlook not only of the present conditions, but also

57. A similar need for the development of 'an historically informed macrosociological perspective on the interrelationships between deviance, control structures and the nature of the wider social systems' is expressed by A. Scull, and largely satisfied, in his Decarceration, Engl. Cliffs, N.J. 1977, p.11. In the area of parole, M. Schmidt, op.cit. suggests that 'in order to understand parole, it must be placed in its proper social, political and economic context and looked at historically and within the specific material conditions of power that exist today' (in the abstract of her thesis).

58. Durkheim considers crime and punishment as social phenomena which are normal and functional in every society. Thus he breaks with the positivist individualism of traditional criminology, but does not account for the historical specificity of particular social contexts apart from a general distinction between mechanic and organic types of solidarity he discerns. See E. Durkheim, The Division of Labour in Society, N. York, 1964 and idem, The Rules of Sociological Method, N. York, 1938 (esp.ch.3) For a full analysis and reassessment of his work see Taylor, Walton & Young, op.cit. (ch.3). Also Chambliss, Functional and Conflict Theories of Crime, in Chambliss & Mankoff (eds), Whose Law, What Order?, N. York, 1976, pp.1-28. For a more general discussion of 'conflict' and 'order'

in envisaging and working towards radical structural change and a new form of social existence. Finally, as a theory of social conflict this model can be considered as more accurately depicting and more deeply explaining material life, class differences, and the patterned inequality, injustice and exploitation inherent in capitalist relations. Although attempts to apply a Marxist model to the study of crime and punishment are not new, only recently have serious efforts been made to infuse criminology with a Marxist flavour. That is why the recent theoretical constructions have not yet taken a 'paradigmatic' form, and are characterised by a great variety of approaches rather than homogeneity in theorising and analysing Marxism.

In the next chapter an attempt is made to apply a certain Marxist problematic to the phenomenon of crime and punishment in a capitalist society, as a necessary background for the understanding of the role of parole and penal practice in general, as well as a theoretical prolegomenon to the historical development of parole, which follows in the rest of this work. However, before we expose our own ideas on the matter it is essential to make explicit our epistemological assumptions and our problematic, since, as we have already seen, a considerable dispute prevails among Marxist theorists, not least that a Marxist theory of deviance is not possible⁵⁹.

models, see J. Horton, *Order and Conflict Theories of Social Problems as Competing Ideologies*, Amer.J. Sociol., vol.71, 1966, pp.701-713, and the Introduction to Chambliss (ed), Sociological Readings in the Conflict Perspective, Reading, Mass., 1973, pp.1-38.

59. For an exposition of a Marxist criminological perspective see ch.7 of Taylor, Walton & Young, op.cit., ('Marx, Engels and Bonger on crime and social control') where they also discuss Hirst's point that no such Marxist theory exists or is possible. See P. Hirst, *Marx and Engels on Crime, Law and Morality*, Economy & Soc. 1 (1), 1972, pp.28-56. The

Indeed, Marx did not systematically deal with crime and punishment, but left only scattered remarks in his various works. Engels wrote a little more but of an empirical nature and mainly as an illustration of the demoralising effects of industrialisation in 19th century Britain⁶⁰. If this is the case, one could speculate that both had 'only a passing interest in crime as an aspect of human behaviour'⁶¹, or that they did not manage to accomplish a systematic work on the subject, as on so many others, or that the study of crime and punishment has been absorbed by the general interests of Marxism, particularly Marxist political economy, which is definitely more accurate. This is not to underestimate the importance of an analysis of crime and penal practice in providing insights and refinements in the postulates of the general Marxist social theory; it is to admit that such an analysis is better understood as a particularisation of the general political economy, as illustrative case of the social relations of production, exchange and distribution prevailing in a capitalist society, as reflected in, expressed through, and preserved by the repressive and ideological apparatuses of the state. Therefore, the Marxist approach to parole in our problematic is informed by the Marxist theory of the State

discussion continued in Taylor, Walton & Young (eds), op.cit., pp.233ff. For a summary and a new Marxist approach see C. Sumner, Marxism and Deviancy Theory, in P. Wiles, (ed), op.cit., pp.159-174. For a sceptical approach to 'radicalism' in criminology see Bankowski, Mungham & Young, Radical Criminology or Radical Criminologist? in Contemporary Crises, vol.1 (1), 1977, pp.37-52. See also C. Sumner, op.cit., Spitzer, Toward a Marxian Theory of Deviance, in Soc. Problems, vol.22,1975,pp. 638-651.

60. Engels, The Condition of the Working Class in England, Moscow, 1973.

61. Taylor, Walton & Young, op.cit., p.209.

directly, and by the theory of the capitalist mode of production indirectly, in as much as the state is epistemologically prior to crime and punishment and the mode of production prior to the state.

That which the founders of Marxism wrote about crime, punishment, law and the state has been greatly distorted, simplified and vulgarised, not least by the Marxist themselves. If one omits traditional criminological textbooks where, if any mention is made to Marxism, then it is usually interpreted as assuming a direct relationship between economic conditions and crime⁶², one could refer to three main variations in the Marxist social theory: 'economism', 'voluntarism' and 'humanism'⁶³.

The variation of 'economism' is based on the assumption that all these phenomena are direct consequences of the economic conditions of society, or epiphenomena of its material basis. In this way, 'economism' distorts scientific Marxism in as much as it fails to consider the relation of reciprocity and the relative autonomy among the various levels of a social formation, and renders the idea of 'the determination in the last instance by the economic' a crude 'economic determinism'. In criminological theory, 'economism' has informed a causative discourse which links crime to the economic conditions under which the criminal lives, as this is apparent in the works of Bonger, to the extent that this criminologist can be considered

62. So Sutherland & Cressey, op.cit. (1966 ed) suggest that 'the socialist school of criminology, based on the writings of Marx and Engels, began about 1850 and emphasised economic determinism'.p.54.

63. For a discussion of these variations in the theory of the state, see Poulantzas, op.cit., ch.2.

as a Marxist and not a positivist sociologist⁶⁴. Engels too is not totally free of an economist causative problematic, especially in his study of the English working class, when he explains criminality as a result of the demoralising effects of capitalism, and the misery and exploitation of the lower classes in society. According to a well known statement of Engels 'if the influences demoralising to the working-man act more powerfully, more concentratedly than usual, he becomes an offender as certainly as water abandons the fluid for the vaporous state at 80 degrees Reaumur'⁶⁵. He also thought that acts like machine smashing, arson, violence against the exploiters and common crime itself, constituted forms of political protest and symptoms of a 'universal outburst' of revolutionary activity against capitalism. He describes crime as 'the earliest, the crudest and least fruitful form of this rebellion', sees theft as 'the most primitive form of protest' and suggests that 'there is no cause for surprise that most of them prefer stealing to starvation and suicide'⁶⁶. The notion that economic conditions of poverty and misery constitute direct determinants of crime is found also in some modern social historians, particularly those studying popular or working class movements. Hobsbawm and Rude, in their study of early nineteenth century social protest, see crime as one method of protest or self-defence in a period when the labourer was 'desperately poor, unemployed, oppressed,

64. W. Bonger, Criminality and Economic Conditions, Boston 1916, and idem, An Introduction to Criminology, London, 1935.

65. Engels, op.cit., p.168

66. Ibid, pp.154, 250, 251, 302.

helpless and hopeless',⁶⁷

For us, to see crime as a result of poverty, unemployment, oppression and other socio-economic factors is to perpetuate the traditional criminological attempts to identify the causes of criminality somewhere, within or without the criminal individual, which has been shown to be both a wrong and a futile enterprise. It is conceded that the study of such socio-economic factors is an important component of any Marxist analysis of crime and punishment, but only when they are seen as indices of the inequality and exploitation inherent in the nature of the capitalist system or as symptoms of the fundamental social malaise rooted in the structure and organisation of the capitalist relations of production, exchange and distribution in concrete, historically determinate social formations, not as determinants of criminality. It is in the dialectical analysis of the capitalist social structure, not in the causative problematic of 'economism' that we must search for the locus and role of crime in society. It is 'the mode of production' as a whole, and not 'the economic', which will provide the key of understanding the nature and function of such social phenomena like crime, punishment, law and the state. One must emphasise here the specific autonomy of the legal-political, as well as the ideological, from the economic and also the reciprocal relation existing between the various instances.

In the field of penology, it seems that the magnificent

67. Hobsbawm & Rudé, Captain Swing, 1969 (Peng), pp49, 58. In p.50 they explain that the labourer 'could seek a relief from poverty in crime - in the simple theft of potatoes or turnips which constituted the bulk of the offences which he would himself regard as criminal, and in poaching or smuggling which he would not'.

study of Rusche and Kirchheimer⁶⁸ leans heavily upon a kind of economic determinism, by assuming that the forms of punishment a society has, creates or avoids is strongly determined by 'social forces, above all by economic and then fiscal forces' or by 'the basic economic needs of a commodity-producing society', that is essentially the demand for convicts 'to fill out the gaps in the labour market'⁶⁹. In this way the influence of the legal-political and ideological instances in shaping and affecting penal practice in a capitalist society is never seriously considered. It is suggested here that a full explanation of the development of a certain punishment or penal measure must take into account the socio-economic, political, legal and ideological conditions prevailing in a concrete and historically determinate social formation, since some penal measures are likely to be introduced either as a means of political expediency or as ideological products of certain penal reform bodies or broader ideological movements. The 'economic' must be considered as determinant only in the last instance, that is by affecting a certain ideology or by effecting changes in the form and content of the legal and political institutions, like the law and the state.

Another distortion of the Marxist theory is found in 'voluntarism', which sees law and the state as directly expressing the will of the dominant class. Law and penal practice therefore are considered as instruments of the ruling class to implement its interests and directly control the

68. Rusche & Kirchheimer, Punishment and Social Structure, N.York, 1939

69. Ibid, pp.5,7

lower classes. Stuscka refers to law as 'a system of social relationships which corresponds to the interests of the dominant class, and is safeguarded by the organised force of that class', while Yudin defines it as 'the actively reflected will of the dominant class, sanctifying and perpetuating the economic and the political interests of that class',⁷⁰. In criminological theory, R. Quinney adopts a more or less 'instrumentalist' view of crime control and the state. Thus, he suggests that 'contrary to the dominant view, the state is created by that class of society that has the power to enforce its will on the rest of society',⁷¹, and that 'contrary to conventional belief, law is a tool of the ruling class',⁷². For us neither law nor the state are directly instruments of the ruling class, but have a relative autonomy from all classes. Under particular conditions they may operate in ways inimical to short term economic interests of the rulers, or take measures which protect in a real sense the interest or welfare of the subordinate classes. Law and the state defend the systemic requirements of capitalism as a whole, and thus can be considered as protecting the interests of the ruling class only in the last analysis, by preserving the existing status-quo and therefore its privileged position within it. It is this last point which also indicates that any view of law as 'an unqualified human good' is, to say the least of

70. See Hazard & Babb,^(eds) Soviet Legal Philosophy, Cambridge 1951, pp20,281.

71. R. Quinney, Crime Control in Capitalist Society, in Taylor, Walton & Young (eds), op.cit., p.192.

72. Ibid. He expresses similar views in his Critique of Legal Order, pp.52, 55, 68. One could include here Hepburn, Social Control and the Legal Order, in Contemp. Crises, vol.1, 1977, pp.77-90

it, misleading⁷³.

Finally, we can note the variation of 'humanism', which is mainly informed by the problematic of the young Marx. As this is not the proper place to discuss the internal conflict in the Marxist hermeneutics about the existence of a 'rupture' in the intellectual work of Marx, we can only say that after the German Ideology of 1845 Marx became more mature, more pure Marxist, stripped of his early Hegelianism⁷⁴. It has been suggested that in his later works he moved away from an image of man as a 'species being' victim of the alienation of life and the conditions of work, towards a more abstract structural category of man, man as 'Bearer' (träger) of objective structures and relations. The 'humanist' variation is partially found in Bonger's concept of 'criminal thought' which results out of the tendency of industrialism to develop in man 'egoism' rather than 'altruism'. The same variation is seen in the 'New Criminology' where although the authors are rightly critical of this approach they are not themselves totally free of 'a philosophical anthropologism' which treats the criminal as a particular individual motivated in his conduct by a deeper stimulus. According to them, a Marxist theory would be satisfactory if it would procede

...with a notion of man which would distinguish it quite clearly from classical positivist or interactionist 'images' of man. It would assume, that is, a degree of consciousness bound up with men's location in a social structure of production, exchange and domination...⁷⁵

73. Such a view is held by E.P. Thompson, in his work Whigs and Hunters London, 1975 and others. See Ch.2 below.

74. L. Althusser, For Marx, London 1970, Poulantzas, op.cit., and C. Sumner, op.cit.

75. Taylor, Walton & Young, op.cit., p.220

Now, this suggestion turns to a certain social psychology of crime, where the Marxist social structure theory is combined with interactionism and phenomenology. Although the motive behind this statement is clear, in the sense that it purports to show that crime is a conscious political 'praxis' of 'making rather than passively taking the external world', or that crime and 'much deviance is in itself a political act'⁷⁰, we suggest that this 'problematic of the subject' is not consistent with a Marxist social theory, whose ontology, at least in the later works of Marx, is one of nature not of man⁷⁷. Such an approach seems to bring bourgeois individualism to the Marxist analysis through the back door. The strong entrenchment of the humanist variation in Marxism is evident in a recent East German criminological study which, echoing Bonger, constructed a behavioural model of capitalism and analysed it as a system which raises individualism and egoism to behaviour patterns easily turned to criminal acts⁷⁸. Spitzer's attempt to formulate a Marxist theory of deviance is similarly founded upon a partial acceptance of 'the problematic of the subject'. He suggests that:

A critical theory must be able to account for both deviance and deviants. It must be sensitive to the process through which deviance is subjectively constructed and deviants are objectively handled, as well as the structural bases of the behaviour and characteristics which come to official attention. It should neither beg the explanation of deviant behaviour and characteristics by depicting the deviant as a helpless victim of oppression, nor fail to realise that his identification as deviant, the dimensions of his threat, and the priorities of the control system are part of a broader social conflict⁷⁹.

76. Ibid, p.222

77. See especially Althusser, op.cit. and C. Sumner, op.cit.

78. Bucholz, Hartmann, Lekschas & Stiller, Socialist Criminology, Lexington, Mass., 1974 (originally published in Berlin 1971).

On the contrary, we suggest that Marxism does not involve an analytic individualism. The object of Marxism is the social formation, as an ensemble of structures and relations. Thus the individual is not a basic unit of analysis in Marxism, but an agent of social relations. Individuals, according to Marx, 'enter into definite relations that are indispensable and independent of their will'⁸⁰, that is relations of production and class relations, and therefore cannot be taken out of the context of these relations. We propose then to apply a Marxist approach to crime and punishment which will try to keep away from these variations, particularly the last one which ushers in positivist individualism and causative debate at the personal level.

More specifically, we shall try to overcome the crude economic determinism of some earlier studies by taking into consideration and analysing the effects of the legal-political and ideological levels of a certain social structure, we shall try to overcome 'voluntarism' by considering law and the state as relatively autonomous from the will of the ruling class and from specific class interests, and, finally, we shall try to avoid both by taking as a central unit of our analysis the mode of production of capitalism, which consists of a complex network of structures and relations. Furthermore, since law, criminal law, punishment and penal practice are located at the legal-political instance of a capitalist mode of production we shall directly concern ourselves with an analysis of the state

79. Spitzer, *Toward a Marxian Theory of Deviance*, loc.cit., p.639.

80. From the famous quotation of the Preface in the Critique of Political Economy, in Marx & Engels, Sel. Works, Moscow, 1968, p.182.

which constitutes not only the cardinal element of the legal-political, but also the factor of cohesion of the whole mode of production, as well as the nodal point of its disruption.

It must be admitted that in reality neither 'pure' modes of production nor social formations exist. What really exist are various forms of state in specific, historically determinate conjunctures. That is why in this study certain concrete and historically determinate social conjunctures of some capitalist states - different in geographical, political, economic and cultural terms, for the sake of comparison and analytical diversity - are singled out for examination. The selection of the states is not totally arbitrary and rather was prompted by bourgeois criminological studies, which consider these places or epochs as milestones in the history of parole⁸¹. Our analysis, however, far from attempting to confirm such a linear development of the idea or practice of parole, tries instead to examine the cases of early release on licence, that developed in each particular context, as independent and unique objects of analysis bound up and reflecting the socio-economic, political and ideological conditions prevailing in each concrete social formation and capitalist state, with more or less specific functions, even different names. Early release on licence then will be analysed historically, that is within specific, and historically determinate social contexts, not

81. For such 'historicist' accounts of parole, see The Attorney General Release Procedures, Vol.IV (Parole), Washington, 1933, Dressler, Practice and Theory of Probation and Parole, 2nd ed., N. York, 1969, Hawkins, Parole Selection: The American Experience, Ph.D. thesis, Cambridge Univ. 1971 (the 'historical' part of the work), Lindsey, An Historical Sketch of the Indeterminate Sentence and Parole Systems in Journ. of Crim.Law & Crim. vol.16, 1925, pp.9-126, Moran, The Origins of Parole, N.P.A. Yearbook, 1945, pp.71-98, and any traditional criminological textbook. (Sutherland & Cressey, Barnes & Teeters, Abbott, Cavan, Taft etc.)

in the traditional 'historicist' way of tracing its origins and following its linear development to the present moment. It is evident that starting from the mode of production and the capitalist state we avoid the danger of parochialism and isolationalism dominating traditional penology. Parole will then be analysed as an integral part of the penal practice and that in its turn as an instance of the repressive state apparatus. The specific autonomy of parole as a penal measure must not distract attention from the fact of its ontological derivation from pre-existing 'base institutions' or punishments, like transportation or imprisonment, and thus from the fact of its participation in the fundamental material and ideological objectives of the penal practice in general with specific effects. Therefore, more than studying parole and penal practice historically, we shall delineate their 'social ends' or functions to the capitalist state and the capitalist mode of production generally. In short, we shall study the form and content of specific types of early release on licence in concrete social contexts.

Conclusion

The examination of the literature on parole which is informed by the problematic of the dominant criminological 'paradigm' of positivist individualism and other more sociologically-oriented theories of deviance has showed the technocratic nature of most of the studies and the pragmatic piecemeal reformism of others, as well as their inadequacy to fully account for or explain the social foundation of crime and punishment in capitalist society. As a result, we tried

to sketch the general parameters of a particular Marxist 'model' for studying these phenomena, and declare some of the commonest variations and distortions of the Marxist theory found in some earlier or modern works. In the next chapter, my own 'version' of the Marxist approach to the capitalist state, law, the criminal law, penal practice and, naturally, release on licence will be developed.

C h a p t e r 2

THE CAPITALIST STATE AND PENAL PRACTICE:

A THEORETICAL FRAMEWORK

Introduction

As we have noted in the previous chapter, parole has been traditionally studied as an isolated fact of penal practice, as if it operated in a social and historical vacuum. The researchers have been concerned mainly with the problems of practical application and administrative efficiency of parole, at the expense of analysing more fundamental theoretical issues regarding the nature and position of penal practice as a whole within the repressive state apparatus of a capitalist society, thus legitimating penal practice itself and the existing order of capitalist relations.

This chapter is written in an attempt to set an alternative theoretical framework for the examination of the relevant issues, which is founded upon a particular reading of Marxist social theory. The various instances of penal practice, along with the other agencies of law enactment and law enforcement, are here seen as moments of the repressive aspect of the capitalist state which, as the sole possessor of the organised legitimate force within its territory, protects the existing mode of capitalist production and provides the framework for its reproduction. The capitalist society is seen as a class divided society, where the state is not a direct instrument of class will but has a relative autonomy from all classes. Nevertheless, the capitalist state is taken as protecting the political long-term interests of the dominant class in the last analysis, and therefore penal practice itself is seen in the last analysis as an overt political policy aiming at the suppression of the subordinate classes. Within this framework, our approach to

crime and punishment establishes a new 'social reality' for these phenomena which transcends the 'problematic of the subject' that for decades constituted the will-o'-the-wisp of the criminologists and tries to identify the objective co-ordinates and the structural location, as well as the nature and significance of both for the capitalist state.

It must be emphasised from the beginning that our starting point has been the capitalist mode of production, lest we deviate either to 'economism' or to 'voluntarism', which identify Marxist political economy either with the study of the economic relations of production or with the study of class consciousness as the motors behind history. Marx wrote that 'the mode of production of material life conditions the social, political and intellectual life process in general'.¹ The mode of production is here conceptualised, as in some modern Marxist theorists,² as an ensemble or a 'global whole' of three inter-related instances - economic, legal political and ideological - as well as a whole network of simple social relations and class relations. Therefore, the older idea of the topographic metaphor of 'basis' and 'superstructure' is rejected for the reason that it fails to convey the reciprocal relation between the various levels of the social structure, as well as their specific autonomy from each other.³ Needless to say that in reality neither pure modes of production exist nor social formations. What really exist

1. K. Marx, A Contribution to the Critique of Political Economy, (Preface), in Select Works, Moscow, 1968, p.182.

2. Particularly Althusser and Poulantzas. Our analysis of the capitalist state is heavily indebted primarily to the latter's work, Political Power and Social Classes, London, 1973 (and the Greek edition, Athens, 1975).

are various forms of concrete states, in specific, historically determinate social conjunctions, and such forms of concrete states are discussed in the following chapters of this work. Now, however, a more abstract exposition of our approach to penal practice is attempted with specific illustrations from respective empirical situations. Since crime and punishment in capitalist society are located at the legal-political, whose cardinal elements are found in the State and Law, our analysis begins with a theory of the capitalist state.

A Marxist Theory of the State

Unfortunately, Marx did not accomplish a systematic theory of the state and later Marxists only rarely turned their attention to it.⁴ Only recently major studies on the capitalist state have been published, a fact due primarily to the intellectual divorce of most modern Marxists from the 'economism' and 'voluntarism' of earlier periods.⁵ The capitalist state came to be regarded as a more or less independent subject of study, only when it was shown that the legal-political instance of a mode of production, especially

3. The older interpretation was mainly based on Marx's statement that 'the sum total of these relations of production constitutes the economic structure of society, the real foundation on which rises a legal and political superstructure and to which correspond definite forms of social consciousness'. ibid. See also Engels, Anti-Dürhing, London, 1936. Both however are wrongly charged as economic determinists, since both were aware that the economic was determining 'in the last instance' and that there exists a reciprocal relation and interaction between the various elements. Engels admitted later that 'the economic situation is the basis but the various elements of the superstructure also exercise their influence upon the course of the historical struggles and in many cases preponderate in determining their form'. Letter to J. Bloch, in S. Works, p. 692. Gramsci has rejected the metaphor in favour of the 'historical bloc', consisting of 'base' and 'superstructure' together. For a comprehensive analysis of the issue see S. Hall. Rethinking the 'Base and Superstructure' metaphor in J. Bloomfield (ed), Class, Hegemony and Party, London, 1977, pp.43-72.

in capitalism, possess a more or less autonomous existence from the other instances.

It seems that the starting point for any Marxist analysis of the state relates to the historical fact that every state is an institution which developed as a result of the division of a society into warring classes. The state says Engels 'is the product of society at a certain stage of development; it is the admission that this society has become entangled in an insoluble contradiction with itself, that it has split into irreconcilable antagonisms which it is powerless to dispel'⁶. Similarly, Lenin characterises the State as 'a product and a manifestation of the irreconcilability of class antagonisms'⁷. A capitalist society is a class divided society, the field of 'warring classes'. We talk about 'class war' because the social classes can be conceived only in a war situation. Poulantzas argues that 'the social classes are posed only in their opposition'⁸. The social classes are fighting each other in order to realise their objective interests. The class which has the power to do that to the detriment of the others is the dominant class, the others are the subordinate.

4. Engels, The Origin of the Family, Private Property and the State, London, 1973 and Lenin, The State and Revolution, Moscow 1972 and other less important works.

5. The literature is dominated by the works of Poulantzas, op. cit. and Miliband, The State in Capitalist Society, London 1969, Miliband, Marx and the State in Socialist Rev., 1965, pp.278-296, Poulantzas (ed), The Crisis of the State (in Greek), Athens 1978, as well as their debate in the pages of New Left Review: Poulantzas, The Problem of the Capitalist state, N.L.R., 58, Nov. 1969, Miliband, The Capitalist State, N.L.R., 59, Jan.-Feb. 1970, Miliband, Poulantzas and the Capitalist State, N.L.R., 82, Nov. 1973, Poulantzas, The Capitalist State, N.L.R. 95, Jan. 1976. For a recent selection of papers, see also Holloway & Picciotto (eds), State and Capital, London, 1978.

6. Engels, op.cit. (1973), p.229. Also p.232: 'at a definite stage of economic development, which necessarily involved the cleavage of society into classes, the state became a necessity because of this cleavage'.

The capitalist state is an institution 'seemingly standing above society'⁹, with a relatively neutral attitude towards the various classes and a 'relative autonomy' even from the dominant class itself. This characteristic of the capitalist state is the result of the nature of the relations of production and exchange in capitalism, where the direct producers and the owners of the means of production are constituted as typically free possessors of commodities exchanging their commodities on their own free will and in the form of contracts, without use of any direct physical force at the economic. In a capitalist society force is abstracted from the economic and removed to a different level, outside the relations of production and exchange. The state in capitalist society is thus the institutionalised form of the extra-economic physical force abstracted from the contractual relations, which secures in capitalism the capital relations and their reproduction¹⁰.

Although some older Marxist theories see the state as an instrument of the dominant class, modern interpretations consider that the alleged ability of the ruling class to translate its interests into state power directly is problematic. They suggest instead that the capitalist state is not a tool used by the rulers at will, but keeps such a

7. Lenin, op.cit., p.9.

8. Poulantzas, op.cit. (1973), *passim*.

9. Engels, op.cit. (1973), p.229.

10. For an excellent discussion on the form of the capitalist state, see in particular J. Hirsch, *The State Apparatus and Social Reproduction: Elements of a Theory of the Bourgeois State*, in Holloway & Picciotto (eds), op.cit., pp. 57-107. Also J. Hirsch, *Theoretical Remarks on the Bourgeois State and its Crisis*, in Poulantzas (ed) op.cit., pp.97-122.

degree of autonomy and independence from them that is enough to safeguard the existence and continuation of capitalism¹¹. If we consider the state as a direct expression of class will, then it is difficult to understand how the same state guarantees the economic interests of the subordinate classes by imposing economic sacrifices upon the dominant class, or takes other measures inimical to the capitalists. The Marxists who reject the 'instrumentalist' character of the state, however, connect the idea of 'relative autonomy' closely with the idea of 'determination in the last analysis'; in the sense that although the state is autonomous even from the dominant class, it is able, by means of this relative autonomy, to ultimately organise this class in a better way and protect its political interests more effectively. The capitalist state, therefore, may be regarded as an instrument of the dominant class only in the last analysis¹².

The deeper nature of the capitalist state and its function in capitalist society, as well as the social structure itself can be understood if related to the nature of capital relations. Marx has shown that 'it is always the direct relationship of

11. Miliband suggests that Marx himself held two views of the State. In his earlier years he held 'the primary view' that the state was an instrument of the dominant class, while later he held the 'secondary view' that the state was 'independent and superior to all classes'. Miliband, loc.cit. (1965), p.135. Thus in the Communist Manifesto it is written: 'the executive of the modern state is but a committee for managing the common affairs of the whole bourgeoisie', or that political power is 'merely the organised power of one class for oppressing another', p.44. Engels saw the state as an organisation of the capitalists 'for the purpose of forcibly keeping the exploited classes in the conditions of oppression corresponding with the given mode of production'. Engels, Socialism Utopian and Scientific in Marx and Engels, Sel. Works, Vol.2, p.138. Lenin called the state 'the dictatorship of the bourgeoisie'. These views are considered here as right but only in the last analysis.

12. The meaning and significance of the concepts of 'relative autonomy' and 'determination in the last analysis' is discussed in Althusser,

the owners of the conditions of production to the direct producers ... which reveals the innermost secret, the hidden basis of the entire social structure and with it the political form ... the State',¹³. He has also shown that the basis of the capitalist system is 'the process... which transforms on the one hand, the social means of subsistence and of production into capital, on the other hand the immediate producers into wage labourers',¹⁴. In the capitalist mode of production a wage labourer is owning nothing apart from his labour power, which he is compelled to sell in order not to starve, and the capitalists own the means of production and extort the surplus-value. The capitalist relations of production are simultaneously relations of domination and exploitation at their real basis, even when they appear in exchange as relations of equality and freedom. The capitalist state, by securing the undisturbed supremacy of the capitalist relations of production, ensures thus class domination and exploitation and acts as 'the guarantor of a given set of property relations',¹⁵

Repressive and Ideological Apparatuses of the State¹⁶

If in form the capitalist state is the institutionalised force abstracted from the economic relations of production, in

For Marx, London, 1970. For a critique of the whole Althusserian school, see E.P. Thompson, The Poverty of Theory, London, 1978. Since this is not the proper place to enter into theoretical debate regarding these and similar issues, my analysis is necessarily schematic and the adoption of the Althusserian 'model' admittedly mechanistic.

13. Marx, Capital, Vol.III, Moscow 1962, p.772

14. Ibid., Vol.I, 1867, pp.752-4

15. Sweezy, The Theory of Capitalist Development, London, 1946, p.242.

16. Apart from the general works mentioned above, we have also

content it constitutes the factor of cohesion of the whole system, the instance which unites all parts in a global orderly co-existence, the power which maintains, preserves and protects the smooth functioning of the existing social, economic, political and ideological order. The state is the Great Guardian of the existing status quo. More than that, the state secures the reproduction of the system and its perpetuation by securing the reproduction of the conditions of production. In order to realise its objectives, the capitalist state possesses the monopoly of the organised physical repression, the exclusive use of legitimate violence to coercively enforce its will upon all¹⁷. In contrast to the feudal mode of production, where the political power was fragmented among various institutions, the capitalist state is a centralised and unified locus of power. The repressive state apparatus, as it has been called, consists of a more or less systematic ensemble of a series of sub-centres of coercion or instances, like the police, the criminal justice system, the penal practice and, in exceptional circumstances, the army. The formal legal rationality or the 'rule of law', which characterises the capitalist society, ensures that the repressive aspect of the state can never typically turn into open class oppression, but must be realised under legal, typically classless and

benefitted by the works of Althusser, *Ideology and Ideological State Apparatuses*, in L. Althusser, *Lenin and Philosophy and Other Essays*, London, 1971, pp 123-173; Miliband, *Marxism and Politics*, London, 1977 (especially Chapters III and IV); Wolfe, *Political Repression and the Liberal Democratic State*, in Platt & Cooper (eds), *Policing America*, Engl. Cliffs, 1974, pp10-23.

17. This characteristic of the capitalist state has been recognised by many non-Marxist sociologists, not least by Max Weber, although they relate it to every form of state. For an analysis of Weber's views see R. Bendix, *Max Weber: An Intellectual Portrait*, London 1966, especially Chapter XIII, pp.416-457.

apolitical safeguards.

The capitalist state has the monopoly of the physical repression which is legitimate, in the sense that it is based on the support and consent, or at least the toleration, of the ruled as well as the rulers. As naked force cannot by itself preserve any kind of power for long without raising anger, resistance and counter-force among the dominated, the capitalist state is found in the constant need of legitimating its force, particularly through consciousness-manipulation by the ideological state apparatuses (schools, mass media etc.)¹⁸. More than simply legitimising its rule the capitalist state aspires at the creation of a more or less spontaneous consent to its authority which would render repression an invisible and secondary factor of 'public order' kept in reserve and used only in extreme circumstances¹⁹.

Independently of the existence of repressive and ideological apparatuses of the state, it must be emphasised that within the apparatuses themselves repression and ideology are supplementing and complementing each other, with specific effects related to the nature and particular function of each

18. Althusser (1971), loc.cit., passim. As Hays says 'the sanction of the State is force, but it is force that is legitimised, however imperfectly, and therefore the state deals also in ideologies'. Hay, Property, Authority and the Criminal Law, in Hay et al (eds), Albion's Fatal Tree, London, 1975, p.62.

19. Gramsci considered the establishment of political 'hegemony' of the ruling class as the main objective and aspiration of the capitalist state, and characterised 'hegemony' as 'consent re-inforced by force'; a situation where direction and persuasion by the state are coming before coercion. See generally Gramsci, Selections from the Prison Notebooks, London, 1973 and L. Gruppi, The Concept of 'Hegemony' in Gramsci Athens, 1977 (in Greek). Wolfe suggests, however, that a situation where everyone had accepted the legitimacy of the capitalist society and all its daily consequences would be 'the most perfectly repressive (though not violently so) capitalist system', loc.cit., p.11.



apparatus. In other words, neither are the repressive state apparatuses only repressive, nor the ideological state apparatuses only ideological²⁰. This will be evident when we refer to a concrete instance of the capitalist state repressive apparatus, which constitutes one of the more important elements of the capitalist penal practice; the prison²¹. Although the internal structure, as well as the justifications for the specific regimes have varied in specific historically determinate conjunctures, custodial control as the principal repressive aspect of this institution has been a common attribute. While death penalty aimed at the total elimination of the offender, prison has secured his temporary elimination by keeping him within sharply drawn boundaries and raising between him and society unsurpassable walls. If custodial control had been a common denominator to all penal establishments, ideological manipulation of the minds of the inmates has been the other; even policies directly concerned with the body of the prisoner had aimed ultimately at his mind. According to Foucault's metaphoric inversion 'the soul had become 'the prison of the body'',²². Solitary confinement, absolute silence and a well organised religious, educational and physical training tried to make prisons places of personal transformation and moral regeneration. In modern times, as in earlier periods, the prisoners are expected to get out of prison 'better men and

20. Althusser (1971), Poulantzas (1969)

21. For a summary of the roles of prison in society see Chapter 1 of Fitzgerald, Prisoners in Revolt, Penguin ed., 1977. Also Smith & Fried, The Uses of the American Prison, Lexington, 1974 and especially M. Foucault, Discipline and Punish, London, 1977 where an excellent analysis of the genesis of prison and its functions can be found. The same author sees prison as a means of even 'physical elimination' and as a part of the society-prison-society vicious circle. See his interview On Attica in Telos, no.19, Spring 1974, pp.154-161.

22. M. Foucault, op.cit., p.30.

women physically and mentally than when they came in',²³. As a matter of historical fact, custody in capitalist types of prison had not been seen only as an objective in itself²⁴, but as an ideal context for the application of ameliorative and reformatory influences, on purpose to change the attitudes, values, thoughts and mode of life of the prisoners and to mould them into shapes acceptable to their rulers within and without. Moreover, the shaping of the prisoner had not been in imitation of an ideal image of 'man' but in imitation of an ideal image of 'working man': industrious, docile and disciplined, contented with his lot and rank in society, and thus passive and acquiescent.

Early release on licence, as a type of penal measure, illustrates in a similar way how repressive and ideological elements and functions are interwoven in the primarily repressive instance of penal practice, which is a component of the repressive state apparatus. The repressive aspect of early release on licence is evident in the imposition of various conditions, particularly the supervision by an official agency, and the possibility of revocation. The conditional aspect of parole not only perpetuates the control of the state over the parolee, but also increases the power of the state over him and his immediate environment (house, family, friends, workplace, etc.); that is in areas of the parolee's life where the state had no such power before. The conditional

23. From the well known statement of the Gladstone Committee reporting in 1895, Parl. Papers, c.7702

24. As in previous times, when prisons were used as places of detention of criminals awaiting trial, or execution, or as a means to ensure payment of debts. See G. Ives, History of Penal Methods, London, 1914.

element of parole ensures that the ideological function of prison continues in a new, wider, environment, and that the state interferes with the attitudes, representations and modus vivendi of the parolees, and attempts to change them or channel them into 'safe' and 'permissible' outlets.

The capitalist state has the monopoly of the legitimate physical coercion, but does not always monopolise the control and containment of all social problems; to a large extent it 'delegates' part of this task to, or more often tolerates and encourages such initiatives by, various private social groups and organisations combining a proportion of ideological and repressive elements²⁵. These associations, societies and the same are institutions whose conditions of existence and framework of functioning are sanctioned by the state or backed by a state apparatus, and thus are not totally irrelevant to any notion of state power, or class bias at that; nevertheless, the way in which the capitalist state intervenes in a particular situation depends upon the existence and availability as well as the effectiveness of such parallel private or semi-official associations. Penal policy in general and prison reform in particular constitute an area in which, as we shall see in this study, private interest and influence are constantly

25. The same point is made by Spitzer in his article Towards a Marxian Theory of Deviance, Soc.Probl., Vol.22, 1975, pp638-651. For numerous examples of such associations especially in the case of philanthropy and social work, see Young & Ashton, British Social Work in the Nineteenth Century, London, 1956, Bremner, American Philanthropy, Chicago 1960, Smith & Zietz, American Social Welfare Institutions, New York 1970, A.W. Lacey, The Role of Voluntary Effort in the After-care of Offenders, unpubl. Ph.D. Thesis, L.S.E. 1963 (in 3 volumes) and others mentioned in the following chapters.

demonstrated²⁶. Particular attempts take the form of 'moral crusades' or 'movements'²⁷ that purport to fight real or imaginary social evils of a certain place and time on behalf of the state, which thus can congratulate itself on its 'neutrality'. However, as we shall see in the following chapters, such associations, charities, philanthropic societies or moral and penal reform movements operate within legally prescribed limits and with a conspicuous 'consensus on fundamentals' of their members, either in regard to the value and inevitability of the existing socio-economic and political system or in regard to the basic philosophy and objectives of the penal policy and the state in capitalist society. More often than not such private efforts express and re-inforce the dominant ideological hegemony, even when they propose trivial or piecemeal reforms that cannot transcend established structures. Thus they help the state to retreat to a second line of defence of the prevailing order. As an example of this observation we take the 'reformatory movement' in America which, although it arose as a reaction to unqualified social Darwinism and unrestricted laissez-faire relations, was imbued by an essential 'conservatism' and did not aspire (or dare) to transcend the wider confines of capitalism. In fact, as it will be shown later²⁸ the reformers' efforts were ultimately directed at the dampening down of rebellion and revolution

26. In the English context such efforts are described in Rose, The Struggle for Penal Reform, London, 1961, and in the international context in Grünhut, Penal Reform, Oxford, 1948.

27. See Gusfield, Symbolic Crusade: Status Politics and the American Temperance Movement, Urbana, 1963, A. Platt, The Child Savers, Chicago, 1969, D. Rothman, The Discovery of the Asylum, Boston, 1971.

28. In Chapter 5 of this work, where the relative bibliography is cited.

of the lower classes in the turbulent years after the Civil War (1865). Similarly, it will be shown in the chapter on the modern system of parole in Britain²⁹ that the various proposals made by numerous penal reform bodies and interested associations were as a whole underpinned by the dominant ideology of 'rehabilitation' and a universal consensus on the desirability of a parole system. One need not resort to 'conspiracy' theories in order to explain such conservatism or unanimity. This can be done by general reference to the basic desire of the state to create and orchestrate 'public opinion' and the extent of its success, as well as by analysing the class composition of these associations and their structural location in particular historically concrete situations³⁰.

The Capitalist State and the Rule of Law

The basic means by which the capitalist state effectuates its central purpose of preserving the coherence and continuity of the capitalist order is the legal system³¹. As in the case of the state itself, earlier Marxist theories have seen law as an instrument of the ruling class for the immediate attainment of its interests, while bourgeois formalist theories

29. Chapter 6 below

30. The extent to which these 'parallel' institutions operate under the state's encouragement can be easily estimated when juxtaposed with the case of various associations of the 'left' or 'supposed left', which if not outlawed altogether, function under constant harassment and hostility from the state and its apparatuses.

31. Pashukanis' work remains to this moment one of the best analyses of the Marxist viewpoint and a good starting point for further explorations. Apart from his General Theory of Law and Marxism, in Hazard & Bubb (eds), Soviet Legal Philosophy, Cambridge, 1951 (I used a Greek translation of Pashukanis work), more recent developments in social legal thought are analysed in Hildebrand, The Sociology of Soviet Law, New York, 1972. Selected views of Marx himself on the subject of the state and law are given by Bottomore & Rubel(eds), Karl Marx: Selected Writings in Sociology and Social Philosophy, Penguin ed., 1961,p.221-235

have asserted an absolute unqualified autonomy of the legal order in society. For some modern Marxist theorists, however, and for us³², law is regarded as having a 'relative autonomy' from the ruling class and yet as securing, in the last instance, its interests; in other words, law is seen as to some extent autonomous from the direct demands of powerful social actors, but not totally autonomous from the 'systemic requirements of capitalism', and thus from the need for material inequality, economic exploitation and class domination which are inherent in capitalism. From our point of view the legal order is neither an 'instrument' of class will nor 'an unqualified human good' as it is sometimes suggested. It is true that 'the rhetoric and the rules of a society are something greater than sham. In the same moment they may modify, in profound ways, the behaviour of the powerful and mystify the powerless. They may disguise the true realities of power, but at the same time they may curb that power and check its intrusions'³³. It is also true that the legal system has a disciplinary power on every class and 'must manifest a degree of evenhandedness sufficient to compel social conformity'³⁴. Yet, law is not only that. As M.J. Horwitz suggests, the rule of law:

undoubtedly restrains power, but it also prevents power's benevolent exercise. It creates formal equality - a not inconsiderable virtue - but it promotes substantive inequality by creating a consciousness that radically separates law from politics, means from ends, processes from outcomes.³⁵

32. Poulantzas is here, as everywhere else, our guide in developing our theoretical perspective on this subject.

33. The view of law as an 'unqualified human good' has been recently expanded by E.P. Thompson in a long section under the title 'The Rule of Law' in his book Whigs and Hunters, London, 1975. The quotation is from p.265.

34. Eng. Genovese, Roll, Jordan Roll: The World the Slaves Made, London, 1974, p.27.

In the same vein Balbus has recently argued that 'the legal form both produces and reinforces illusory, rather than genuine forms of equality, individuality and community', which contribute significantly to the persistence of capitalism and thus preclude the actual realisation of such ideas³⁶. It is in this sense that Marx spoke about law as 'an ideological form'.

The legitimating and mystificatory aspect of the legal system is the result of the process by which the agents of production are taken out of the real economic material context, where they are distributed in social classes according to their location in the relations of production generally, and are constituted as individual 'subjects', stripped of their class and social determination. This effect has been called 'effect of isolation' or 'competition', and is due to the separation of the direct producers from the means of production in capitalism³⁷. In other words, the 'effect of isolation' transforms the real, unequal agents of production into typically 'free' and 'equal' individuals at the legal level. As the state represents the unity of the isolated

35. In his critique of E.P. Thompson's book in Yale Law Journal, v.86, 1977, p.566.

36. Balbus, Commodity Form and Legal Form, in Law & Society, v.11, 1977 p.580, where it is suggested that there is a certain 'homology' between the form of law and that of commodity. Pashukanis was the first to examine the form of law from this perspective and to establish the view that when the products of labour became 'commodities' - objects of exchange, the owners of commodities became 'juridic subjects'. Pashukanis, op.cit., passim. See also C.J. Arthur, Towards a Materialist Theory of Law in Critique, no.7, Winter 1976, pp.31-46.

37. Poulantzas, op.cit., pp.123 ff. The importance of ideology in obscuring to the agents of production the class nature of their relations and thus leading to 'the effect of isolation' is paramount.

individual citizens, in the same way the legal system is standing before every individual 'juridical subject' as an abstract, impersonal rule. Yet, under the rule of law social inequalities and class differences are obscured, to the effect that unequal, exploitative relations are presented as free encounters of equal persons. 'Juridic subjects' and abstract 'citizens' are substituted for real flesh-and-blood, socially differentiated, class-bound individuals. Equality of all before the law, a not insignificant progressive step from periods of arbitrariness, in the capitalist mode of production secures the maintenance of material inequality.

At the ideological level the separation of the direct producers from the means of production is incorporated in the liberal ideas of 'individualism' and 'human personality', and the ideals of freedom, equality, human rights, rule of law, and the same. These were the watchwords, by which the bourgeoisie launched their long war against feudal inequality, privileges, prerogatives, various fetters, guilds of every kind and other restrictions upon the full development of the capitalist relations, so they came to be felt as universal and ubiquitous ideals. However, Marx and Engels have clearly shown that, far from being universal, these ideals constituted historical products of the transition period from feudalism to capitalism³⁸.

38. Marx has unfolded in every detail this transition period mainly in the first volume of his Capital. See also Engels, Anti-Dürhing, pp.118 ff, 294 ff. They have pointed out that these ideals expressed the ascending power of manufactures and petty industrialists. According to Engels, 'we know today that this kingdom of reason was nothing more than the idealised kingdom of the bourgeoisie; that eternal justice found its realisation in bourgeois justice, that equality reduced itself to bourgeois equality before the law; that bourgeois property was proclaimed as one of the essential rights of man', op.cit., p.24.

The rise of typical equality of all before the law and the state, as well as the dismantling of feudal personal bonds, established the state not only as the locus of the 'general will' but also as the unique focal point of political obligation. On the other hand, the ideas of 'free will' and personal responsibility became the cornerstones of the juridical and penal systems. Crime came to be seen as a violation of political obligation, and punishment as a means of restoration of the social contract through a certain deprivation of liberty proportioned to the amount of guilt, and the nature of the crime committed. On the other hand, imprisonment became the cardinal type of punishment against liberty³⁹. Pashukanis is right in observing that 'the Industrial Revolution, the Declaration of Human Rights, Ricardo's political economy and the system of imprisonment' are phenomena which belong to one and the same period⁴⁰.

The Capitalist state and Criminal Law⁴¹

If the civil law is primarily regulatory in character, criminal law contains more than the form of law; it also contains what Pashukanis calls 'a punitive policy', a policy of criminal constraint. Criminal law is 'an auxiliary branch of law', that is to say the state makes use of it only when every other informal

39. See a marvellous analysis of these developments in Foucault, op.cit., especially the chapter 'Generalised Punishment', pp.73-103. The general political theory of capitalism is analysed in Macpherson, The Political Theory of Possessive Individualism, London, 1962. The concepts are discussed by Plamenatz in Consent, Freedom and Political Obligation, 2nd ed., London, 1968.

40. Pashukanis, op.cit., p.183

41. The importance of criminal law for the state is examined by Chambliss in the article: The State and Criminal Law, included in Chambliss & Mankoff (eds), Whose Law, What Order?, New York, 1976, pp66-100

constraint⁴², ideological persuasion, or civil law have failed to secure observance of the rules of the state. Through the criminal laws, therefore, the state demonstrates its power in a more sharp and manifest form, and its authority in a more crystallised and unambiguous shape. On the other hand, it is only the state which, having the monopoly of defining 'crimes', is itself excluded from such a censure, it is 'beyond incrimination', as they say⁴³. This happens although there is little demonstrable difference, at least behaviourally, between the punishment by the state organs and the crime of the criminal.

Criminal law reflects and expresses in institutionalised form the power of the state to prohibit and allow, in a word to censure, particular practices and thus reinforce the established social, economic, political and ideological order. It constitutes one of the fundamental repressive means by which the capitalist state tries to achieve its objective of preserving the coherence and guaranteeing the reproduction of the capitalist system as a whole. Consequently, the content of criminal law is over-determined by the systemic requirements of capitalism by creating crimes out of acts or omissions which threaten either the maintenance or the perpetuation of the capitalist order.

and by Hepburn's article: Social Control and the Legal Order: Legitimate Repression in a Capitalist State, in Contemporary Crises, Vol.1, 1977 pp.77-90. Particularly useful for our approach have been R. Quinney's Critique of Legal Order, Boston, 1974, and B. Krisberg, Crime and Privilege, Engl. Cliffs, 1975.

42. Like those imposed by family, workplace and other agencies of 'social control' in general.

43. For an analysis of this point see M. Kennedy, Beyond Incrimination, in Chambliss & Mankoff (eds), op.cit., where it is suggested that what differentiates 'crime' from 'penal-sanction' is its 'politicality' and 'penal sanction'. Since only the State has the power to define crimes the notion of 'natural crime' proposed by Garofalo must be rejected. The concept of crime cannot be other than legal. In Greece, this view

From this fundamental observation follows that it is the whole mode of production and not particular interests which put the outer limits of legitimate censure. In other words, it is the global whole and not a particular class which demarcates, generally speaking, the contours within which criminal law functions⁴⁴. In concrete historical conjunctures, specific criminal laws are enacted and enforced on the explicit and direct purpose of protecting particular invested interests of the ruling class or one of its sections at the expense of subordinate interests, as in the case of the Black Act (1723)⁴⁵, the famous Two Acts of 1795, the two further Acts of 1797, and particularly the Test and Corporation Acts⁴⁶, not to mention the various Penal Laws against the Catholic Irish⁴⁷. One could suggest that the examination of each particular law might reveal that behind every such act an invested interest is protected. However, the relative autonomy of the law, as well as the formal legal rationality of the bourgeois rule imply that a broader number of people or the whole people are protected in their life, property and limb by the criminal laws, independently of their original *raison-d'etre* and

is held by Professor Chorafas, in Criminal Law, 8th ed, Athens, 1966, p.136, while Garofalo's theory is supported by Professor Gardikas, in Criminology, vol.I, 5th ed, Athens, 1966, pp 37 ff.

44. For good discussions and further bibliography on this issue, see W.G. Carson, *The Sociology of Crime and the Emergence of Criminal Laws*, in Rock & McIntosh (eds), Deviance and Social Control, London, 1973, pp.67-90, and *idem*, *Symbolic and Instrumental Dimensions of Early Factory Legislation: A Case Study in the Social Origins of Criminal Law*, in R. Hood (ed), *Crime, Criminology and Public Policy*, London, 1974, pp 107-138.

45. Its history is described by E.P. Thompson, op.cit.

46. As we shall see in the next chapter.

47. See chapter 4 below.

objectives. This protection is real and not just ideological mystification⁴⁸, and concerns both the imposition of obstacles to the abusive use of criminal laws by the state and the shielding of all persons against illegal intrusions by their fellows. In this sense, criminal law is really an 'unqualified human good'. However, one could suggest that the relations of domination in capitalism have not resulted in the extirpation of the 'enemies' of the system through open class repression, because the system needs the subordinate classes as a sine qua non element of its existence and reproduction. Also, because a system based on naked class terror and patterned differential enforcement could be impossible to justify and would lead to open civil war. One even could go further in suggesting that criminal law does not protect the powerless or subordinate out of a conscious feeling of justice or other lofty ideals, but as an unwanted and inevitable consequence of the dialectical nature of the capitalist law in its rational, abstract form, which creates the dilemma between political expediency and formal legal rationality⁴⁹; also, that by satisfying the systemic demands of capitalism and protecting the existing system, criminal law helps the state maintain class inequalities in the last analysis. In this sense, criminal law is a class instrument in the last analysis.

48. As Hepburn suggests, when he writes: 'by both design and function the criminal laws are an oppressive tool, working to obscure the inequality and exploitation inherent in a capitalist society' loc.cit p.87. Of course there is a great mystificatory aspect in criminal law, for an analysis of which see Hay, loc.cit.

49. This dilemma (as reflected in the case of civil riots) is analysed by Balbus, The Dialectics of Legal Repression, New York, 1973. For a review essay see Trubeck, Complexity and Contradiction in the Legal Order in Law & Society, vol.11, Winter 1977, pp.529-569.

What 'causes' crime in capitalist society, therefore, is not to be found either in personal or environmental or any other 'criminogenic' source the criminologists have discovered. There is no purpose in perpetuating the bourgeois ideological endeavours of examining the criminal man as a different 'species' without considering him in the first place as the 'bearer' of an objective definitional category expressing the censuring power of the state for the ultimate protection of the social, political, moral or any other order in capitalist society. Even if the traditional aetiological studies had accurately identified and located the source of a certain 'crime' (which they have not), they would have explained the cause of the act but never why such an act had been defined as 'crime'. In any case, the empirical fact that many more criminals are to be found among the lower classes is not taken as showing any inherent criminal tendencies among the members of these classes, but as being the effect of differential law enforcement and the specific relationship of the subordinate classes to the state which determines their relative vulnerability to being regarded as *prima -facie* 'criminogenic' and 'dangerous' populations.

The Capitalist Colonial State

We have noted above that the capitalist relations of production in general are basically relations of domination and exploitation even under 'normal' conditions of extracting the surplus-value. Yet, nowhere is the relation of domination clearer and more exacerbated than in the case of the colonial state, independently of the external or internal character of the colonial situation⁵⁰. In Chapter 4 of this work the famous

Irish convict system and the rhetoric justifying it are examined in great detail together with an analysis of the Irish colonial situation. It will be shown there that a colonial situation more sharply exemplifies the complex interplay of repressive and ideological means by which the colonial state tries to protect the existing system and reproduce it in an alien territory, where its legitimation becomes immensely difficult, if not utterly impossible, and therefore its reliance on naked and brutal force more significant. Colonialism as an extreme case reveals the extremely totalitarian potential of the capitalist state. Whereas in the nation-state the mediation of ideology obscures the great inequalities of the material existence and dampens down protests by pointing to the primacy of the 'national interest', the colonial situation is overwhelmingly managed by use of violence. 'The colonial world is a world cut in two' says Fanon⁵¹, in an attempt to summarise the separation, departmentalisation and discrimination characterising colonialism. Social life, social relations, the cities themselves are dichotomised in two specific zones 'reciprocally exclusive'. Colonial situations are total dominations, where coercive violence and a satanic ideology which tries to reduce the colonised to an inferior race⁵², to

50. For an analysis of colonialism we relied on Marx & Engels, On Colonialism, Moscow, 1968 (a selection from their writings), F. Fanon, The Wretched of the Earth, Peng. 1967 and, mainly, M. Hechter, Internal Colonialism, London, 1975. Also, on H. Idzikowski, Internal Colonialism and the Emergence of the Irish Police, unpubl. M. Phil Thesis, Edinburgh, 1977.

51. Fanon, op.cit., p.29

52. Racism is an important component of colonial domination, but it is ridiculous that it was used even in Ireland (see chapter 4 below), where no specific racial differences could be identified between colonisers and colonised. Nevertheless, an 'apology' developed even there. For racist notions and their justification in the case of the Negro slave

the level of 'superior monkeys' in Sartre's apt phrase, together with sustained efforts to devalue and obliterate the cultural life and historical tradition of the colonised, are the means by which colonial situations are maintained.

The situation of internal colonialism is almost similar to that described above, but the main discrimination takes place between core and periphery⁵³.

Criminal law and penal practice are fundamental instruments of the colonial state for the suppression of the occupied and the subduing of their resistance. Law, as everything else here, protects the settler and his interests. Every challenger to the colonial system is deemed a criminal. That is why the line of demarcation between colonised and coloniser is drawn by means of rifle-butts. Or as Fanon put it, 'the dividing line, the frontiers, are shown by barracks and police stations'⁵⁴.

At the heart of colonialism lies economic exploitation, and criminal law is instrumental in securing this situation.

Chambliss has suggested that it is not inaccurate to say that the 'entire history of colonial criminal law legislation is that of a dominant social class defining as criminal those acts which it served their economic interests to so define'⁵⁵.

On the other hand, extra-ordinal repressive measures are exercised in the colony for the same purposes. One cannot help referring to the numerous Penal Laws against the Catholic

see the most interesting study of W.D. Jordan, White over Black, N. Carolina, 1968.

53. For an analysis of these concepts see Hechter, op.cit.

54. Fanon, op.cit., p.29.

55. Chambliss, loc. cit., p.68.

Irish until 1829, as well as the establishment in Ireland of a centralised colonial police organised on military principles and the presence of a standing army there, both of which were absent from the metropolis herself. Also in colonial Ireland the differential application of the laws for the prevention of crime and the subordination of the colonised is evident in the case of parole, which was granted in Ireland under strict enforcement of the conditions of release, (while in England they constituted 'practically a dead letter'), and by which parolees and ex-prisoners alike were placed under surveillance after release either by the police or by an especially appointed official (while in England surveillance was rejected as 'unbecoming' to the English character). Ideology was also instrumental in justifying colonial rule. The Irish penal establishments of the period became places of explicit political indoctrination with the merits and values of capitalism and the essential 'innocence' of the colonial domination, in an attempt to free the Irishmen from their 'prejudices' and create an acquiescent, disciplined and industrious labour force and a docile and passive population.

In brief, we could suggest that in the case of colonialism, external or internal, the state loses more and more of its relative autonomy from the 'economic' and the dominant class and becomes the direct instrument of the colonial rulers for the protection and promotion of their economic and political interests, not only to the detriment of the lower classes, but also to the sacrifice of whole populations of a different national character or cultural attribute.

The Capitalist State and Penal Practice

The monopoly of the legitimate physical repression possessed by the state implies that in the end it is only the state which has the power to enforce its laws and inflict punishments for their violation, for the purpose of maintaining the existing order and securing its reproduction. Actual imposition of sanctions as a means of suppressing undesired behaviour is a modality of power operating in various other repressive or ideological institutions of social control, but it is only the state which punishes in the proper sense. Punishment as a method of sanction for criminal behaviour is implemented, supplemented, or even modified in the process of implementation by a series of practical and auxiliary means called penal measures. Penal measures are therefore not punishments; they are not imposed upon convicted offenders by the courts as a reaction to a committed crime. They have a degree of independence from, or constitute historical outgrowths of, the immediately preceding punishments or 'base-institutions', but cannot exist without them. This is apparent in the case of early release on licence, which is the subject of this work, that has developed as an historical outgrowth of pre-existing 'base-institutions', like transportation of convicts to the colonies or incarceration to a penal establishment. Punishments and penal measures constitute together the penal practice of the capitalist state which, as we have seen, represents one of the cardinal elements of the repressive state apparatus and manifests state authority and power in its most acute and advanced form. We have already suggested that neither the repressive state apparatus is

only repressive nor the ideological apparatuses only ideological. Indeed, penal practice not only protects the existing status-quo by literally eliminating or suppressing the convicted criminals, but also strives to secure its reproduction through a special interference with the bodies and minds of the offenders, on purpose to 'change' them, if possible, into totally 'acceptable' personalities. In concrete, historically determinate conjunctions the emphasis is set either on the repressive or the ideological aspect of a punishment or penal measure, even shifts from one to the other, as a result of wider socio-economic changes in the form of the capitalist state and capitalist society; moreover, the notion of punishment itself is eroded in favour of the notion of 'treatment' as we shall see below.

The form of punishment in capitalist society is similar to the legal form in general, and is determined by the form of equivalent exchange of commodities prevailing in capitalist relations. Pashukanis traced the origins of punishment in biological vengeance, but observed that vengeance became a juridic phenomenon when it was brought in association with the form of equivalent exchange⁵⁶. Punishment then is inflicted as the equivalent to the harm caused by the crime. The criminal with his crime opens a contract with society which punishment is going to fulfil ex post facto, according to Pashukanis⁵⁷. Hence the idea of proportionality as the fundamental formal characteristic of bourgeois punishment,

56. Pashukanis, op.cit., p.171.

57. Ibid.

which remains intact after all, even when modifying penal measures are applied to a certain punishment. In this respect early release, which at first glance disturbed the idea of proportionality underpinning the preceding punishment of transportation or imprisonment was followed and made possible by the imposition of conditions, and therefore the principle of equivalence of 'harms' exchanged between punishment and crime committed was restored⁵⁸.

With regard to the content of penal policy we have already shown that it constitutes an advanced weapon for the defence of the existing order and the maintenance of class domination in the last analysis, although the bourgeois criminologists have obscured the political nature of penal policy by employing a 'consensus model' of society, where punishment aims at the protection of an abstract and vague entity called 'society' as a well integrated whole⁵⁹. It is true that Marx himself suggested that 'punishment is nothing but a means of society to defend itself against the infraction of its vital conditions'⁶⁰, but this quotation must be interpreted as meaning a class-divided society⁶¹. Also, it must be read as a polemic against

58. Though the conditions of parole restored the idea^{of} equivalence this was a necessary, but not a sufficient reason for the introduction of parole. In particular social contexts, parole was in dialectical opposition to the eliminative function of the previous punishment, or not justified on ideological grounds or reasons of political expediency, and therefore was not used as a penal measure, as we shall see in a moment.

59. See previous chapter

60. In an article on Capital Punishment (1853), quoted in Bottomore & Pubel (eds), op.cit., p.234

61. On a relevant point Engels explained that when he spoke 'of society as a responsible whole having rights and duties', he meant 'of course, the ruling power of society, the class which at present holds social and political control'. The Condition of the Working Class in England, Moscow, 1973, p.134.

the Hegelian notion of punishment as 'the right of the criminal' and as an attempt to establish instead the nature of punishment as a social phenomenon.

Penal practice, as a reflection of state power, is then an integral part of the social structure and not an isolated fact emerging in an historical void. The types of punishment and kinds of penal measure a penal practice incorporates are closely linked with the type of society which uses or creates them. So, it has been rightly suggested that 'every system of production tends to discover punishments which correspond to its productive relationships'⁶². Of course, we cannot talk about slavery without a slave economy or prison labour without manufacture or industry or even fine as a general punishment without a money economy. It seems that the 'discovery' of punishments does not exclude the adoption of older types of punishment, if they are able to serve the needs of the new productive relationships. As Rusche and Kirchheimer have shown, various types of punishment can be integrated in the whole social and economic system, if society is in a position to incorporate them. Thus, not only the use of a punishment or penal measure, but also their avoidance in a particular social context can be a good occasion for comparing material realities or ideological environments which favour or discourage the introduction of particular punishments or penal measures. So, it will be shown later in this study⁶³ that while the ticket of leave developed in Australia almost immediately after colonisation of this island as an almost inevitable means of

62. Rusche & Kirchheimer, Punishment and Social Structures, 1939, p.5,7

63. In the next chapter

penal and colonial policy, it was, on the contrary, totally undesirable in the metropolis, where the punitive mentality of the ruling oligarchy, the colonial ideal, and various other reasons made transportation 'beyond the seas' an effective way of getting England rid of her unwanted criminals for long periods of time or all eternity. Similarly, it will be shown, in the American context⁶⁴, that while parole in the form of indenture developed in the houses of refuge at the beginning of the 19th century, it failed to develop in the contemporary institutions of penitentiaries which were established on the explicit purpose to take the criminals away from the temptations and evil influences of the corrupt and vicious society and improve them through penitence, solitary confinement, silence and other methods. In both cases the introduction of early release on licence was in direct opposition to the basic aim and rationale of the preceding 'base-institutions', and therefore in principle unacceptable.

Furthermore, the type of punishment or penal measure is more specifically determined, to a great extent, by the condition of the labour market, in the sense that extensive use of the convicts is made by the state directly or indirectly when the demand for labour power exceeds the supply of the free market. This point is particularly explored in relation to the ticket of leave in Australia⁶⁵, which was invented as a means of providing cheap labour for the economic development of the colony (as indenture had done for centuries for the

64. In Chapter 5 below

65. In the next chapter. Here we do not examine 'indenture' as a form of early release on licence in colonial America, since its nature and function are almost identical to those of the ticket of leave in Australia, which is studied in great detail.

development of America). Ticket of leave was a penal measure implementing and realising the punishment of transportation, which was itself a means of exploiting the labour power for economic and specifically colonial purposes. Also, in the case of America⁶⁶, we shall see how the American prisons were profitably used by private entrepreneurs as a means of supplementing the free labour market. The relation of convict labour to the labour market is not only quantitative, but also qualitative, and relates to the demand for a certain quality of labourers. From this respect, some penal establishments function as processing machines of human raw material from the margins and the lower strata of society, whom they teach skills and habits of disciplined and spontaneous industry, and then convey them to the labour market as a finished product⁶⁷. With prison such a machine, early release on licence operates as a periodic check, picking up and taking out of the machine those whom the operators and foremen consider as in no need of further processing.

The nature and function of punishments and penal measures is, further more, influenced by fiscal considerations. As Rusche and Kirchheimer suggest, 'in so far as the basic economic needs of a commodity producing society do not directly determine the creation and shaping of punishment, that is to say insofar as convicts are not used to fill out the gaps in the labour market, the choice of methods is largely influenced by fiscal interests'⁶⁸. Indeed, fiscal considerations play a

66. In chapter 5 below

67. This was particularly so in the American Houses of Refuge as we shall see in chapter 5.

68. Rusche & Kirchheimer, op.cit., p.7.

crucial role in the introduction and subsequent fate of punishments and penal measures, as well as in formulating social policy in general and penal policy in particular. The influence of fiscal interests is either positive - as a stimulation to making the penal system self-sufficient or profitable - or negatively - as a reason for cutting expenses and reducing costs. Fiscal reasons possess a special significance for the capitalist state in its modern form which as a result of its perennial fiscal crisis finds itself at the constant need to economise⁶⁹. Two important developments illustrating the recent drive towards economy in the area of penal policy have been the extensive use of fines and the tendency towards 'decarceration'. We shall see in Chapter 6 that parole in Britain was introduced in 1967 as a partial consequence of this tendency.

Finally, penal policy is strongly affected by ideological considerations and many methods of punishment and penal measures are established as ideological products of certain penal reform movements or associations, as we have already noted above. Thus, in America, penitentiaries were the ideological products of the movement which Rothman called 'the discovery of the asylum', reformatories ensued as ideological products of the 'reformatory-movement', while parole as a legal device was firstly introduced in the Elmira Reformatory in 1876 as an adjunct to the new 'reformatory' regime of the institution⁷⁰. Similarly, the modern British system of parole

69. The modern state, its function and its fiscal crisis are examined in chapter 6 below.

70. See chapter 5 below.

was introduced partially as an ideological product of the post-war 'welfarism', and as an expression of the 'rehabilitative ideal' dominating penal ideology in contemporary Britain⁷¹.

Parole as an Instance of Penal Practice

Parole here is taken semantically and not literally, meaning every type of early release on conditions. In the following chapters we shall examine in great detail how the various forms of parole developed in the concrete historical circumstances of specific social formations. In this section we attempt to delineate a picture of parole as an instance of the capitalist state penal practice, and outline its specific economic, political and ideological contribution for a more effective penal practice and thus for the better realisation of the state's objective aims.

In order to more fully understand the nature of parole and its specific position within capitalist penal practice, we bisect parole into its two cardinal elements, for analytical purposes: the element of early release, and the element of conditions. The first signifies and implements the liberating nature of parole, the second its repressive and restraining aspect. Thus, the ontological and teleological status of parole is inherently ambiguous and intrinsically contradictory. Moreover, early release or conditions are not only liberating or restraining respectively; the 'time-game' inherent in parole release may constitute a real oppressive experience on the mind of the potential parolee, while early release may well mean 'enslavement' in a different context, as when a

71. In chapter 6 below

transported convict was released earlier only to find himself 'assigned' to a master for the remaining part of his sentence. On the other hand, the conditional element may include genuinely helping and liberating moments, or may fall into such a degree of desuetude as to be of nominal import only. The contradictory nature of parole is clearly reflected in the empirical fact that in the modern British system many prisoners reject early release on licence, and prefer in its stead a longer period of confinement with absolute freedom after release⁷².

In the various social contexts, we shall enquire here, early release on licence operates at a great variety of levels, but always revolves around the pivot of its two main elements. Whether the emphasis is set on the one or the other element it is the purpose of this work to study, as well as in which form, under what socio-economic conditions, and for what purpose. It is here suggested that the more a type of punishment loses its 'punitive' character to become subordinate to a broader economic policy of the state, through the combined effects of fiscal considerations and strong demands for labour, the more dominant the liberating element of parole becomes. Thus, the colonial underpinnings of transportation to both America and Australia made 'indenture' and 'ticket of leave' respectively methods of providing cheap labour power for the economic development of these countries. The predominance of the liberating element of parole is reflected either in

72. See the Annual Reports of the Parole Board for England and Scotland for the numbers of prisoners who, although eligible, do not want to be considered ('opt-out'), especially the Report of the Parole Board for 1968, H.M.S.O., 1969, paras. 46-48.

the great number of granted licences or in the long periods of parole or both. On the other hand, the conditional element of parole is given greater importance the more repressive a penal practice becomes, or the more parole is considered a measure of 'treatment' protecting the welfare of the parolee through assistance, guidance and help after release. The first is evident in the case of the early release on licence in Ireland, where surveillance by the police or an appointed official, strict conditions and immediate application of the process of revocation of parole for 'any transgression' constituted the dominant attributes of the whole system. The predominance of the conditional element of parole was also reflected in the small number of licences granted, and in the careful selection of parolees by an 'automatic' process within a progressive system of discipline and training⁷³. The second case is related to the more general shift from 'punishment' to 'treatment' which resulted from wider socio-economic and ideological changes, specifically the transition from a competitive to a corporate capitalist society⁷⁴. Illustrations of this case can be found in the modern British system of parole, or the system of parole operating in the American reformatories in the late nineteenth century. It seems necessary then to look closer at the ideological foundations and the material underpinnings of 'punishment' and 'treatment', in order to better understand the above mentioned shifts in both penal ideology and parole as an instance of penal practice.

73. As we shall see in chapter 4 below.

74. To a similar conclusion, although not based on premises similar to ours, P. Young has come in his unpublished paper, Punishment and Social Organisation, Edinburgh, 1978.

Punishment is directly connected with a competitive capitalist society, and its ideological parameters are delineated by the concepts of political obligation, deprivation of liberty, equivalent exchange and formal legal rationality, as we have noted above. Under the dominance of early liberal notions, punishment as a means of interference with personal liberty was justified as a necessary step by the state for the restoration of the 'social contract' which crime had disturbed. It consisted of a temporary suspension or removal of individual rights pertaining to man as a 'citizen', and therefore it had to be proportionate to the degree of forfeiture of these rights involved in the commission of crime. Punishment, as the equivalent removal of freedom to the 'harm' resulting from the criminal act, reflected the form of laissez-faire capitalist relations of production in general, where the equivalent exchange of commodities prevailed. We have already suggested that the imposition of conditions in parole became necessary in this context in order to restore the idea of equivalence incorporated in the preceding punishments of transportation or imprisonment, which was momentarily disrupted by the element of early release. The punitive aspect of penal policy corresponded to a similar aspect in the existence and enforcement of the conditions of parole, where the restrictions and constraints upon personal liberty aimed at the prevention of crime and the control of the individual in a different environment approaching free society. The more repressive the social context and the penal practice as a whole, the more oppressive the nature and the enforcement of the conditions, the more parole supervision constituted mere

policing and surveillance of the parolees.

The emergence of corporate or monopoly capitalism brought about a certain ideological erosion, but not eclipse, of the concept of punishment, and an ascendancy of the concept of reformation or treatment as the ideological foundation of the capitalist state penal intervention. The increasing state interference with the economic and its involvement in the production of use-values which do not take the common form of a commodity (infrastructure, welfare services etc.) has resulted in a certain transformation of the homology between legal form and commodity form⁷⁵, we have noticed above. The inflated economic role of the state⁷⁶ meant that neither capitalists nor direct producers are typically add totally free agents for the production of commodities, and that the market alone ceased to be the invisible regulator of the economy. Also, the creation of corporations and huge monopolies and oligopolies made obsolescent the notion of the individual entrepreneur competing on equal footing with his fellow businessmen, and thus 'equality' and 'personal freedom' lost some of its traditional connotations. The break with the equivalent exchange of commodities at the level of the material existence of society was reflected in the corresponding break with the principle of proportionality between crime and punishment, and the ascendancy of the idea of an indeterminate sentence, individualisation of 'punishment', and the medical model of treatment 'until cured'. Under welfarism freedom is

75. See Balbus, loc. cit.

76. See Miliband, The State in Capitalist Society, esp. Ch.4; Baran & Sweezy, Monopoly Capital, Peng ed., 1966; Holloway & Picciotto (eds), op.cit.

no more the absence of restraint, but the means of self-realisation of every individual⁷⁷; the state is presented as the paternal and beneficial agent protecting the interests of all, especially the underprivileged, and not just the 'night watchman' of public order. In this case, penal intervention by the state is no more seen as a mere punitive policy, but as a means of satisfying the needs and the best interests of the criminal, that is his 'welfare'. The same shift took place in the justification of the conditional element of parole, which far from restraining individual liberty came to be seen as a means of achieving the reformation and treatment of the offender through generous assistance, material and psychological help, and kind support from the society as a whole, which is seen after all as responsible for its criminals, and their fate. In this way penal policy in general and parole in particular became mere technical problems of crime control, and lost much of their legal formality prevailing under conditions of competitive capitalism. But, have they really changed significantly in their location and function within the capitalist state under their new form? Before we turn to the analysis of parole, and although we discuss elsewhere in great length the meaning and mechanics of rehabilitation and treatment⁷⁸, we would like to briefly anticipate the answer by emphasising the immense ideological importance of 'treatment' in legitimating the penal practice of the capitalist state and mystifying the real nature and function of penal intervention.

77. For the changing concept of political freedom see Fr. Neumann, The Democratic and Authoritarian State, New York, 1957; Jordan, Freedom and the Welfare State, London 1976, George & Wilding, Ideology and Social Welfare, London, 1976.

78. In chapter 6 below

The concept of treatment obscures the political nature of crime and its class determination in the last analysis, because it applies at the level of individual 'pathology' and not at the level of social structure and social organisation. By depoliticising the essence of crime and personalising the social structural defects, treatment and rehabilitation are overt political acts, and thus not fundamentally different from the traditional policy of 'punishment' in this respect.

Coming back to the analysis of the nature and the ambiguous ontological status of parole, we would like to refer to various ideological constructions that purport to establish the legal foundations of parole and rather justify the absence of constitutional safeguards in the parole process⁷⁹. Thus, parole has been characterised as an 'act of grace' on the part of the paroling authorities, and therefore as a privilege and not a right of the prisoner⁸⁰. This 'theory' fits well a punitive-retributive model of punishment, but is out of context in a treatment-welfare model, in which parole is seen as a means of social protection through generous assistance and positive involvement with the case of the parolee for his final

79. For an analysis and critique of the supposed legal foundations of parole, see Gottesman & Hecker, Parole: A Critique of its Legal Foundation and Conditions, in New York Univ. Law Rev., Vol. 38, 1963, pp.702-739, with extensive reference to American judicial decisions. In the Greek context disagreement about the legal nature of parole prevails. See generally H. Protopapadakis, The Institution of Parole, Athens, 1954 esp. ch.6 (where parole is regarded as a sui generis correctional method) K.G. Gardikas, Criminology, Vol.3 (Corrections), Athens, 1965, 3rd ed, p.441 (who suggests that the parolee is sub-poena, and that under Greek law he has a right to be released if reformed), and M. Bacatsoulas, General Principles of Corrections, Athens, 1971, p.174 (who believes that no such right of parole exists, but that it could do so de lege ferenda).

80. So the Parole Board in their first Annual Report, H.M.S.O., 1969, para. 15: 'Parole is not granted as of right', or their report for 1973, para. 4: 'parole is not a right'.

integration into society. The theory of 'contract' is based on the empirical observation that as a rule parole is not given automatically, but only to those consenting to be released on parole and actually signing the parole certificate as an ensurance for the acceptance of the conditions of the bargain. This construction drawn to its logical conclusion turns to an Hegelian idealistic notion of punishment, under which the prisoner has the right to stay in prison and keep his cell, even if the state decides otherwise, which is rather absurd under the circumstances. On the other hand, this theory assumes that a formal equality exists between the two bargaining sides, when in reality only the one part (the State) determines the conditions of the contract unilaterally. Although the prisoner has the option to refuse the offer, this does not amount to a material equality between the two bargaining powers. As the formal equality between the juridic subjects obscures their real inequality, in the same way this construction mystifies the powerlessness, subordination and dependence of the prisoner vis-a-vis the repressive state apparatus. The third theory of 'custody' is the most confusing and inarticulate, conceiving that the parolee is in legal custody and thus without any freedom, but in this way is unable to differentiate between actual imprisonment and parole, treating both as legally isomorphic.

The ambiguity concerning the legal foundations of parole and its ontological status notwithstanding, parole possesses a specific significance for the state and penal policy at various levels of operation. Briefly, on the one hand the element of early release may operate either as a means of

broader economic or social expedience, or as a part of various administrative, bureaucratic or fiscal policies, or as a means by which the power of the state over the convict population is enhanced⁸¹. Thus the ticket of leave in Australia was used as an instrument of both penal and colonial purposes, as well as a means of reducing governmental costs. Fiscal considerations influenced every type of parole, but very often the liberating element of parole, apart from reducing the cost of the penal policy, operated as a 'safety valve' to disciplinary and number pressures within the penal institution; in this way order was maintained, and thus the state legitimacy was not put in danger. Moreover, parole operates as a mechanism of behavioural manipulation⁸², because it interferes with the amount of time a prisoner is going to remain inside prison. The 'carrot' of early release, presented as a potential reward for good conduct inside, increases the ability of the institution to gain his co-operation, and greatly supports order and discipline. The indeterminacy intrinsic in parole hangs tyrannically, like a sword of Damocles, over the minds of the inmates and therefore the grasp of the State over them becomes more intense. The selective basis upon which parole is given, although appearing as open to all, reflects the filtering function of parole which ensures the longest possible warehousing of the 'dangerous'

81. For an examination of the last point see K.O. Hawkins, Some Consequences of a Parole System for Prison Management, in D.J. West (ed), The Future of Parole, London, 1972, pp.96-115.

82. Parole is included among the various mechanisms of control within prison. See Messinger's unpubl. Ph.D. Thesis, Strategies of Control, Univ. of Calif. at Berkeley, 1968. The contradictory nature of parole, however, implies that sometimes parole becomes a factor of disorder because of the feelings of bitterness and frustration which are likely to rise in some prisoners after parole denial.

criminals, and the privilege of a 'pass' for those considered 'ready' or 'safe'. The rhetoric justifying early release portrays it as a 'humanitarian' gesture of good will to the parolee whom it saves from the bad effects of imprisonment and its pains, or, in the context of rehabilitation, as a mechanism operating at the 'optimal point' of a prisoner's life when further incarceration is considered as either useless or harmful⁸³. Apart from being an incentive to good behaviour, parole legitimates penal control by mystifying the actual operation and position of prison in society⁸⁴. More specifically, its presentation as a privilege worthy of attainment means that the inmates fight for access to this facility and not against it and imprisonment itself. The distractive function of parole is closely linked with the constant projection by the paroling authorities of the centuries old sophism that parole constitutes 'a key' in the hands of the prisoners themselves, and therefore it is up to them to stay or get out of the prison⁸⁵. This ideological inversion of the status of the prisoners as almighty, independent, and self-reliant again obscures the degree of powerlessness, dependence and oppression inherent in the

83. For an analysis of the ideological construction of 'the optimal point' and the virtual impossibility of its identification see chapter 6 below.

84. Thus J. Schmidt suggests that parole is 'a very important part of the mystification surrounding imprisonment', in the introduction to her Demystifying Parole, unpubl. Ph.D. Thesis, Univ. of Calif. at Los Angeles, 1976.

85. Alexander Maconochie, widely regarded as 'the father' of parole, suggested that 'when a man keeps the key of his own prison, he is soon persuaded to fit it in the lock'. Years later, the American penal reformers Wines and Dwight considered as an aim of reformation the 'placing of the prisoner's fate, as far as possible, in his own hands', while the Declaration V of the Cincinnati Congress of 1870 proposed that 'the prisoner's destiny should be placed, measurably, in his own hands'. All quotations are from Lindsey, An Historical Sketch of the Indeterminate System and Parole System, in J. of Amer. Inst. of Crim. Law and Criminology, Vol. 16, 1925, pp.9-126.

material existence of every penal establishment.

As far as the conditional element of parole is concerned, we have already analysed its significance for the state by pointing out that the various conditions of parole increase the power of the state over the parolee and his immediate environment and, importantly, over areas of the parolee's life which were exempt from such a control before. We have also seen, that the number and content of conditions, as well as the extent and intensity of supervision, are likely to vary through time and place, and are likely to be determined by the social, political and economic conditions of each specific social context. The repressive aspect of parole is likely to be justified as constituting part of the whole process of reformation which began at the moment of arrest⁸⁶, and as concerned with the individual parolee's interest and welfare by assisting and helping him, and by guiding its first difficult steps after a period of custody, in order to ease the transition from custody to partial freedom as a bridge between prison and community. Supervision and provision of conditions are portrayed as satisfying the real 'needs' of the individual for protection and psychological shelter at the period of 'adjustment', as well as keeping him alert and careful in avoiding further misbehaviour⁸⁷. These justifications of parole are drawn from the ideological arsenal of the rehabilitative ideal, and therefore share in the important for the state mystificatory function of rehabilitation, which

86. Thus Newmann, who calls parole part of 'the correctional cycle' which begins with the arrest and ends with the release, Newmann (ed) Sourcebook on Probation and Parole, Springfield, 1964, 2nd ed., p.x.

87. See generally Dressler, Practice and Theory of Probation and Parole, New York, 1969, 2nd ed.

we have touched above and shall analyse in Chapter 6, that is the depoliticisation of crime and punishment and the personalisation of social structural defects. From this viewpoint too, then, parole constitutes a politically charged practice, although it appears as a neutral and technocratic policy of rehabilitation and treatment. On the other hand, even within the rehabilitative model, the welfare of the parolee is served, and his interest is protected, only if, and to the extent that, this is compatible with 'the public interest', or 'the protection of society', which again shows the primarily repressive-controlling nature of parole as a penal measure of the Capitalist State. Taken that this is the nature and function of parole, it makes little difference for both which part of the state apparatus has been charged with the responsibility of granting or denying it.

Conclusion

In this chapter we have developed a certain framework for the examination of penal practice which has been derived from the general Marxist theory of the capitalist state. We have suggested that penal practice, as an ensemble of various punishments and penal measures, constitutes an instance of the repressive state apparatus with specific ideological effects, and thus reflects and expresses the certain position and role of the state in capitalist society. The State itself constitutes the factor of cohesion of the social whole, protects the existing socio-economic, political and ideological order, and secures its reproduction in society. Taken that the capitalist relations of production are simultaneously relations of inequality, exploitation and domination the state guarantees their continuous

existence and thus in the last analysis becomes an instrument of the dominant and powerful classes. We have also suggested that penal practice does not function in an historical and social void, but constitutes an integral part of the whole social structure with specific meaning and functional significance in specific, historically determinate social conjunctures. It is within such concrete, historical, social contexts that we propose to examine early release on licence in the following chapters of this work.

Chapter 3

TRANSPORTATION OF CONVICTS TO AUSTRALIA

AND THE SYSTEM OF TICKET OF LEAVE

Introduction

Ticket of leave as a form of early release on licence developed in Australia at the last years of the eighteenth century. When the transported convicts of Britain were unwillingly laying the foundations of a new colony. It emerged as an outgrowth of transportation and shared with it an ambiguity of character and a multiplicity of purposes that were derived from their being both methods of punishment and instruments of colonial policy. Although the tension between the penal and the colonial in the ticket of leave was indisputable, as in the 'base-institution' of transportation itself, the liberating element of the ticket of leave constituted the dominant characteristic of the system and was overdetermined by the colonial. Ticket of leave, along with the system of assignment and other contemporary practices, arose out of the socio-economic context of the newly founded colony and provided a means by which cheap convict labour was made available for the economic development of the settlement. Fiscal reasons relating to reduction of governmental costs were from the beginning instrumental for the introduction and establishment of this and other types of remission of sentence, while its potential as an incentive to good behaviour had frequently been recognised. The repressive supervising element of this type of early release had been largely undeveloped and of subsidiary status mainly consisting of police surveillance and conditions almost exclusively related to freedom of movement within a particular district of the settlement, thus endeavouring on the one hand to disperse the criminal population and on the

other hand to restrict the mobility of the labour force and regulate its distribution.

In the present chapter, we shall examine the nature and function of early release on licence in the form of ticket of leave in Australia, the social and economic context in which it developed, as well as the system of transportation of convicts to the colonies as a form of punishment and as an instance of colonial policy¹. The instrumental role of this peculiar colony to the mother country - either penal or colonial - will be firstly analysed by examining the socio-economic and political context of the late eighteenth century Britain as the framework with which transportation of convicts to Australia began.

The Development of the Punishment of Transportation²

Transportation of convicts was practiced by Spain and Portugal as early as the fifteenth century, but it is England that first introduced this punishment on a systematic basis. It developed within particular social formations as a result of major economic changes at historical periods when human life attained a greater value and the convict population came to be recognised as a potential labour force at the disposal of the

1. Although no special study of the ticket of leave in Australia exists the indebtedness of our analysis in this chapter to some basic works on the foundation of the colony is enormous. These are the valuable studies by E. O'Brien, The Foundation of Australia London, 1936, C.M.H. Clark, A History of Australia, Vol.1, Melbourne, 1962 and A.G.L. Shaw, Convicts and the Colonies, London, 1966. Also, L.L. Robson, The Convict Settlers of Australia, Melbourne, 1965 and J. Ritchie, Punishment and Profit, Melbourne, 1970 (a discussion of the Reports of the Commissioner John Bigge 1822 -1823). For the socio-economic context of the colony we have been largely based on the selection of papers edited by E.J. Abbott & N.B. Nairn, Economic Growth of Australia, 1788-1821, Melbourne, 1969.

state. The frequent epidemic diseases and the continuous war enterprises which plagued the mercantilist and pre-industrial societies had resulted in the decimation of whole populations, the deterioration of social conditions for the masses, the reduction of labour supply and inadequate work. The then current theories about the imminent danger of depopulation directed the attention of the State to the necessity of increasing the birth rates, while the bewildered capitalists demanded that the State save the lives of certain convicts and exploit their labour power in implementing its mercantilist policies. It was within this framework of exploitation of convict labour that the common state policies of re-inforcing the army with criminals and filling the galleys with convicts spared from the gallows emerged. A further step in the same direction, following colonial expansion, was the shipping of the convicts to the newly acquired colonies as a source of cheap labour. England, being one of the great colonial powers, adopted the new method of punishment and made it one of the central features of her penal system.

Although transportation was unknown in the common law, according to Blackstone³, it seems that it was in some way

2. For the development of this punishment, see Rusche & Kirchheimer, op cit, pp.24ff. Also DuCane, The Punishment and Prevention of Crime, London, 1885, pp. 110-151, M. Wilson, The Crime of Punishment, London, 1931, pp. 89-132 and any general penological textbook.

3. Blackstone, Commentaries on the Laws of England, 1830, 17th ed, p. 137, informs us that 'it was inflicted by choice of the prisoner himself to escape a death sentence'. Wil. Eden traced the origin of transportation back to the ancient custom of sanctuary, according to which when a criminal took refuge on a sacred place he escaped the death penalty and was allowed to 'abjure the realm'. Eden, Principles of Penal Law, London, 1775, p.31. The custom of sanctuary was very common in ancient Greece, as well as the custom of banishment beyond the boundaries of the city-state, called ostracism.

practised before its first legal sanction by the Vagrancy Act of 1597, which provided for the deportation of 'such rogues as shall be thought fitt not to be delivered'.⁴ We do not know for sure whether any immediate action took place after this Act; it is likely that no batches of such 'dissolute persons' had been sent 'out of this Realme' and 'beyond the seas'. It is certain, however, that an Order in Council of the year 1617 marks the beginning of transportation to Virginia and other parts of America and West Africa⁵. Combined with a paternalistic humanitarianism, an explicit colonial objective underpinned the *raison d'être* of that Order:

...soe as his Majesty both out of his gracious Clemencye, as also for divers weighty Considerations could wishe they (convicts on death sentences) mighte be rather corrected than destroyed, and that in their punishmentes some of them mighte live and yealde a profitable service to the Commonwealth in partes abroad, where it shall bee founde fitt to imploye them.... giving full power warrant and Authoritye to us... to Reprieve and stay from execution such persons... who for strength of bodye or other abilityes shall be thought fitt to be employed in forreine discoveries or other Services beyond the Seas.

It is characteristic that 'the strength of body or other abilities' as essential prerequisites of hard and adequate labour, and no other considerations of guilt or natural justice, were proposed by the said Act as criteria for the commutation of death sentences. This related to the specific needs of the colonies, where vast uncultivated lands were brought into production. However, scarcity of labour made the wages higher, which, in turn, made easier the possession of land, and this

4. The Act was 39 Eliz. c.4.

5. Acts of the Privy Council, Colonial Series, Vol. 1, March 24, 1617.

maintained the chronic shortage of supply in the labour market. Such was the demand for labour in the developing colonies, and particularly America, that in addition to the slave trade, the transportation of convicts, and the immigration of free settlers, a peculiar type of illegal practice emerged by which children and young men and women were 'kidnapped' from the streets and taverns and sent to the colonies as servants ('kidnapping' or 'spiriting')⁶. On the other hand, it was a common practice in America in the early period of colonisation for everybody to be granted a certain number of acres of land for any servant he imported at his own expense. It is in this sense that it has been suggested that the white slave trade not only paralleled but also preceded that of the Negroes⁷.

The number of convicts transported annually is a matter of some dispute⁸, but not so important in itself. What is important is the nature and function of transportation as a method of punishment. The significance attributed to the advantages of transportation can be seen in the fact that although it began as a reprieve of a death sentence it quickly

6. For the economic history of colonial America see H.V. Faulkner, American Economic History, 8th ed, N. York, 1960, esp. ch.4 (Colonial Agriculture and Labour), pp 59-75. For the history of the slave trade the work by E. Williams, Capitalism and Slavery, 1944, remains fundamental. Kidnapping was practiced even by the dominant classes as a profitable enterprise. It has been recorded that majors and judges intimidated small rogues and pilferers with the terror of hanging so that they begged for transportation, were delivered for a sum of money to special contractors, and were transported. For the history of transportation to America see generally Shaw, op.cit., pp.21-37. Also A.E. Smith, Colonists in Bondage, White Servitude and Convict Labour in America, 1607-1776, Univ. of N. Carol. Press, 1947 and idem, The Transportation of Convicts to the American Colonies in the Seventeenth Century, Amer. Hist. Review, 1954, Vol. 39.

7. E. Williams, op. cit., ch.1

established itself as an independent method of punishment for an endless list of offences. Between 1720 and 1745 no less than 15 Acts introduced transportation as a direct secondary punishment for such crimes as, for example, stealing a fish from a pond or river⁹. Apart from any other aims the economic function of transportation remained the same and was often bluntly stated in the Acts themselves. The preamble to the Transportation Act, 1718 declared that the purpose of the Act was to deter and supply labour, since 'in many of His Majesty's colonies and plantations in America there is a great want of servants'¹⁰.

The transportation of convicts was done by special contractors who were given a property in the services of the convicts, and at least until 1772 they were receiving a bounty of £5 per convict. After the arrival of the ships in America the convicts were 'hired out' to free settlers, for sums varying according to their 'qualifications', and for the term of their sentence¹¹. Naturally, the fate of a transportee, if he survived the passage of the Atlantic, lay to a great extent in the hands of his master who had 'a property and interest' in his services. The demand for convict labour in the plantations was so strong that

8. Thus it has been estimated that 1000 convicts (O'Brien), 500 (Shaw) or 300-400 (Wilson) were annually transported to America.

9. For a compilation of such crimes see O'Brien, op. cit., Appendix A, pp.370-371.

10. 4 Geo. I, c.11

11. The specific colonial context of America meant that every single convict was 'indented' to free settlers after an auction by the contractor. It is widely considered that indenture in America constitutes a type of early release on licence, yet we

after 1772 the Government stopped paying even the £5 subsidy to the contractors. In this way transportation helped colonial development, got the country rid of her criminals and was fiscally advantageous as a cheap and, later, almost costless method of punishment.

Therefore, when the American War of Independence terminated the transportation of convicts the metropolis strongly felt the impact of its abolition and searched for other outlets in other places of the world or for alternative solutions. Efforts were made at persuading the planters of the Southern States to take some of the convicts, albeit unsuccessfully. Similar attempts directed towards Canada and Nova Scotia had the same fate. By 1785 it was clear that no inhabited colony had any desire to become a receptacle of convicts, either from fear of contamination or because the slave trade provided an abundance of cheap labour. In the meantime, convicts awaiting transportation at the rate of about one thousand a year started to accumulate at the British gaols. The hard reality was reflected in contemporary Parliamentary discussions where propositions for urgent action were made¹², while less panicked spokesmen

shall not examine it here since it is basically similar to the practices of assignment and ticket of leave developed in Australia which are examined later in this chapter in great detail. Common male labourers were 'sold' for £10 apiece, females at £8 or £9 and artificers from £15 to £25, as D. Campell, one of the main contractors stated. He also stated that old and infirm people he was offering free to humane settlers or even after paying them a premium. See his evidence before the Select Committee on Returns of Felons, Journal of H. of Commons, Vol. XXXVII, 1779, p.306.

12. See the debates in Parliamentary Register, Vol. III, 1776, p.473

suggested patiently waiting for the end of the war in the hope that the American revolt would be crushed and any obstacle to the resumption of transportation there removed. It was then that a new type of punishment was introduced by Act of Parliament: the hulks¹³. The new penal measure came as a compromise solution and consisted of a type of 'internal transportation', according to which the convicts were kept in 'floating boats' supposedly on their way to the colonies, yet going ashore for public labour like 'raising sand, soil and gravel'. Although it had been envisaged as a 'temporary' solution it lasted eighty-two years and constitutes one of the darker pages in English penal history. According to the bitter aphorism of the Webbs 'of all the places of confinement that British history records the hulks were apparently the most brutalising, the most demoralising and the most horrible'¹⁴.

The following decade was one of feverish legislative action. The cessation of transportation to America and the inability of the hulks to absorb all the convicts brought to the fore some earlier proposals for the erection of 'penitentiaries' based on separation and hard labour. An act of 1779¹⁵ authorised such a policy, but never materialised due to 'unforeseen difficulties

13. The Act was 16 Geo.III c43. In its preamble making the necessity to seem as magnanimity the Act condemned transportation as 'depriving this Kingdom of many subjects whose labour might be useful to the community'. For the history of hulks see W.B. Johnson, English Prison Hulks, 1957.

14. S. & B. Webb, English Prisons Under Local Government, London, 1922, p.45.

15. The Penitentiary Act, 19 Geo.III.c74

in the extraordinarily incompetent administration of those days',¹⁶. Some important general statutes, however, in combination with some local Acts, endeavoured to give an impetus to many programmes of rebuilding and reorganisation of the gaols. With the passing of time the hulks became overcrowded, the gaols suffered from chronic congestion, while the current discussions on the advantages of the proposed new prisons cast many doubts about the validity of both as systems of punishment. Meanwhile the alternative of 'the salutary' solution of transportation came to be portrayed as the main way to successfully ameliorate the difficult situation, and was perceived as a much needed remedy, apart from other considerations 'if only to relieve the pressure on the gaols',¹⁷. The conditions were made worse by an increasing crime rate. Thus, in 1786, the Pitt Government came to the momentous decision to resume transportation to a new part of the globe, the Botany Bay area in New South Wales, a place conveniently discovered by Captain Cook some years before.

16. Webbs, op.cit., p.46, where a detailed exposition of the penal developments at this period.

17. Select Committee on Transportation, 1785, Com.Journ., XL, p.1161. The same report referred to 'the extraordinary fulness of the gaols' which thwarted any effort at classification and led to a promiscuous spreading of the 'contagion of criminality'.

Transportation of Convicts to Australia

a) The Motives for its Resumption

The motives behind the resumption of transportation have been a matter of considerable dispute, especially between Australian historians, who are interested in the early years of their country. Some believe that transportation was a method of colonisation, while others argue that it was a method primarily concerned with the disposal of the convicts. The latter used to be the traditional and dominant view, unquestioned until 1952 when K.M. Dallas argued that 'the mere getting rid of convicts was not under consideration in the settlement of Australia; the documents will bear out that literal interpretation but this ignores the mercantilist spirit'¹⁸. M. Roe, writing in 1958, was somehow influenced by Dallas' rejection of the traditional view, but finally accepted the orthodox explanation¹⁹. Another historian, T. Reese, did the same in 1961 but with the qualification that 'on the whole the evidence supports (the orthodox view) but it may be misleading to read too much significance into the documents or to assume that they, in themselves, make the whole picture'²⁰. It was in 1964 that another work added its voice against the tradition and laid emphasis on the imperial strategy of Britain. Blainey in his book 'The Tyranny of Distance' argued that 'Australia was first settled with the twin hopes of giving England the naval supplies

18. K.M. Dallas, The Settlements in Australia in Tasmanian Historical Research Association, Papers and Proceedings, 1952, No.3

19. M. Roe, Australia's Place in the Swing to the East, 1788-1810, Histor. Studies, Vol.8, 1958.

20. T.R. Reese, The Origins of Colonial America and New South Wales, Australian Journal of Politics & History, Vol.7, No.2, 1961, p.186.

it needed and ridding England of the people it didn't need',²¹. According to the same author 'flax was the first conqueror - a hollow conqueror - of the distance which so often shaped Australian destiny',²². On the other hand, the traditional view is held by such authorities in the field as O'Brien, who wrote in 1938, Ward, who concluded ten years later that 'the complete absence of private enterprise made it easy to confine the new settlement within the limits of a penal colony',²³ and C.M.H. Clark, whose 'A History of Australia' reinforced and backed O'Brien's thesis²⁴. To these a more recent work must be added, Shaw's 'Convicts and the Colonies', which generally agrees with this latter view²⁵. All these historians put emphasis on the penal character of the new settlement without totally rejecting the colonial aspect of the case. Thus, O'Brien suggests that 'the paramount motive' which led Britain to the hazardous experiment of founding a colony in the Antipodes was 'the disposal of the convicts',²⁶. As the same author put it:

...there is no shred of evidence that if the gaols of England had not been unwontedly full, the colony would ever have been founded when it was²⁷.

A.G.L. Shaw agrees with her, that 'ridding England of her

21. G. Blainey, The Tyranny of Distance, McMillan, Melbourne, 1975, (ill.ed.), p.22

22. ibid.

23. J.M. Ward, British Policy in the South Pacific, 1948, p.12. In a later work he retained the same opinion. See *idem*. Historiography, in A.L. McLeod, (ed) The pattern of Australian Culture, New York, 1963, p.195.

24. C.M.H. Clark, op.cit., Vol.1, esp. ch.4.

25. A.G.L. Shaw, op.cit.

26. O'Brien, op.cit., p.182. A much earlier view held by Professor Melbourne suggested that Australia 'was occupied deliberately in order to relieve the overcrowding of the gaols'. Melbourne, Early Constitutional History of Australia, New South Wales, 1788-1856, Oxford, 1934, pp.5-7.

undesirables' seems to have been the government's 'principal concern'²⁸. In another of his works the same historian makes the same proposition in a more direct way:

No imperialist sentiment, no vision of the future, either of Australia or of the British Empire, was the motive for establishing it; simply the desire to rid England of some of her surplus convicts...²⁹

He qualifies his attitude, however, by acknowledging that "there was certainly a long-term interest in terra australis incognita"³⁰.

The two approaches to the study of transportation - colonial or penal - are not contradictory in any way; both assume a functional model of explanation and both are tacitly or explicitly using a means-ends schema. But it seems that the account which considers transportation as a way of disposing of convicts, while not false in itself, unnecessarily narrows its explanatory potential and lays its emphasis on an inadequately perceived hierarchy of priorities. After all, transportation to America originated without these prison problems, a fact which weakens the view that the accumulation of criminals was the necessary condition for the resumption of transportation. It is true that an increase in crime at that period and the reduction in the number of executions made the situation in penal institutions intolerable. Transportation was an excellent alternative to that situation; also, it had the great advantage that 'no cheaper mode of disposing of convicts could be found' as Pitt himself declared in Parliament³¹. The relief of this pressure

27. O'Brien, op.cit., p.126.

28. A.G.L. Shaw, op.cit., p.49.

29. A.G.L. Shaw, The Economic Development of Australia, Melbourne, 5th ed., 1966, p.10.

30. Idem., op.cit., p.49.

then was of the utmost necessity and since it was so obvious it has been traditionally seen as the main objective of transportation. However, a broader analysis of the historical situation suggests that apart from being a means of administrative expediency transportation was envisaged also as an instance of the colonial policy of a growing capitalist country which also was a great imperialist power³².

To look at transportation of convicts to New South Wales only as a way of emptying the gaols and hulks at home ignores the wider national and international context in the second half of the eighteenth century within which the genesis of that 'peculiar colony' took place. Having so far analysed the domestic situation, especially the bad condition of the overcrowded penal establishments in the country, we shall now try to outline the general international framework and the domestic circumstances of Britain which led to the resumption of transportation, not only as a means for solving the crime problem of the metropolis, but as a means for expanding British power and commerce to the South Pacific and enhancing her imperial supremacy in the world³³.

The second half of the eighteenth century was characterised by an intense colonial and commercial rivalry between Britain

31. Parliamentary Debates, in Parl. History, Vol.XVII, 1056-1059 and XVIII, 1224.

32. For the period in English history leading up to the Industrial Revolution, see Chr. Hill, Reformation to Industrial Revolution, London, 1967 (and Pelican ed. 1969), and Ch. Wilson, England's Apprenticeship, 1603-1763, London, 1965.

33. For a comprehensive account of the colonial policy of Britain at this period, see D.K. Fieldhouse, British Colonial Policy, in Abbott & Nairn (eds), op.cit., pp.9-30. For a broader discussion of imperialism see G. Lichtheim, Imperialism, Penguin, 1971.

and France. The importance of the colonies overseas as sources of raw materials, new markets and military bases was so obvious to the economists and politicians of the era that the various states were competing to acquire as many colonies as they could, either peacefully or by war. The two points of conflict between the two great powers were North America and India in particular, but when the end of the Seven Years War (1756-1763) confirmed British supremacy in India and Canada, both countries turned their attention to the Pacific. Also, the American War of Independence (1775-1783) changed the international power structure, apart from its effect on the domestic affairs of the country. It is known that France helped the thirteen colonies in their revolution in various ways, thus aiding the formation of a new nation and intensifying her rivalry with Britain. Another great power of the time, the Netherlands, was in conflict with Britain from 1780 to 1783 and later it moved towards an alliance with France; this endangered the trade links between India and China. Apart from this, the South Pacific had already become a potential target of the British colonial policy as it constituted the area where a growing whale fishery was carried out by British firms licenced by both the East Indian and South Sea companies with strong support by the government. Under these circumstances it was inconceivable that Britain could ignore the claims she had on New South Wales, which Captain Cook had discovered in 1770, especially when the Netherlands

Older standard works on colonialism include H.T. Manning, British Colonial Government after the American Revolution, New Haven, 1933, R.L. Schuyler, The Fall of the Old Colonial System, 1770-1870, New York, 1945. See also D.K. Fieldhouse, British Imperialism in the late Eighteenth Century, in K. Robinson & F. Madden (eds) Essays in Imperial Government, Oxford, 1963

had their own claims to the north, west and south coast and to Van Diemen's Land, and when France despatched an expedition under La Perouse in 1785 to the same area. Britain had to hurry up before these foreign powers put their foot on the continent and made the affair more complex. In 1786 she commissioned Captain Arthur Phillip as the first governor of New South Wales.

The 'swing to the East', therefore, had been a further step in the colonial and imperialist strategy of Britain and was stimulated by the circumstances of the international power distribution and the need for more wealth, power, prestige and national aggrandisement on the part of Britain against other powerful competitors. The Prime Minister, Pitt, who came to the decision to resume transportation to Australia, was of the opinion that as the greatest danger to England's power and prosperity came from France, in association with Spain, everything likely to reduce French trade should be promptly sought after and that everything stabilising Britain's supremacy in the seas was to be regarded as of utmost importance. Sea power was the instrument and the guardian of the British expansion, commercial returns being the basic gains of this naval predominance. Pitt, believed that 'our trade depends upon a proper exertion of our maritime strength; that...riches, which are the true resources of the country, depend upon commerce'³⁴. Charles Wilson, who has written the history of the one and a half centuries before 1763, observes that 'commercial aims were a powerful component in Pitt's strategic thinking'³⁵, while

34. In Wilson, op.cit., p.281

35. ibid, p.284

E.J. Hobsbawm remarks that the governments of the period were really helpful in these matters:

Yet conquering markets by war and colonisation required not merely an economy capable of exploiting those markets, but also a government willing to wage war and colonise for the benefit of British manufactures....(Britain) was prepared to subordinate all foreign policy to economic ends. Her war aims were commercial and (what amounted to much the same thing) naval³⁶.

Seen in this wider context of British policy in the second half of the 18th century the voyage of the first fleet to New South Wales, even transporting 'the scum of the earth', takes on a wider significance than being simply a solution to the British crime problem. Nairn, after discussing the various arguments and views on the issue why Botany Bay was selected as a receptacle of convicts, came to the conclusion that:

The convict problem gave the stimulus for action within the framework of a relatively well-developed imperial strategy, which included at least a partial assessment of future commercial possibilities...³⁷

It is true that the new colony was of a 'peculiar' nature. There were no free settlers in the First Fleet; there were no plans for the provision of any private enterprise, nor for the production of any staple product beyond those needed for the survival of the first residents. The governor was given nearly autocratic power and no legislative or executive councils were formed. This is why Fieldhouse characterised New South Wales as 'an imperial hybrid' at the start³⁸.

In the following section we shall examine more closely

36. E.J. Hobsbawm, Industry and Empire, Penguin, 1968, p.49

37. N.B. Nairn, The Selection of Botany Bay, in Abbot & Nairn (eds), op.cit., p.56

38. D.K. Fieldhouse, British Colonial Policy, ibid., p.9.

how the colonial element of transportation to Australia had already taken shape before the departure of the First Fleet, and how this element affected the life and structure of the infant colony from the very beginning. Also, we shall analyse how the penal and the colonial elements were both reconciled and made diffused, this endowing the whole system with an ambiguity of aims and objectives from which it was absolved only by the final cessation of transportation there. Moreover, we shall show that it was the same ambiguity which characterised the subsequent practices of assignment and early release on licence in the form of ticket of leave. Finally, we shall argue that the ticket of leave constituted the means by which the penal and the colonial were reconciled within the socio-economic context of the new settlement.

The Ambiguous Nature of Transportation: Penal v. Colonial

We have seen that after the loss of America not only did the traffic of offenders to the West come to a standstill, but also a large market was closed for Britain and this had serious economic consequences. The Empire, smarting under humiliation, wanted new outlets to replace its imperial prestige. Britain wanted a new colony and many plans were well under consideration. Colonisation proposals by private citizens and official committees were in the air many years before the departure of the First Fleet. As early as 1783 an ambitious would-be coloniser proposed for the first time a settlement in New South Wales, where the chief advantages were mainly commercial and military. The possibilities of trade with the countries of the Far East were underlined, and the establishment of a 'naval station' for

the annoyance of Holland and Spain was emphasised. Two years later another plan was submitted to the government stressing similar advantages of a commercial and military character. Neither the first plan by Matra, nor the second one by Admiral Young were implemented at once, but both were taken seriously into consideration³⁹. A Select Committee in 1779 proposed that:

the plan of establishing a colony or colonies of young convicts in some distant part of the globe and in newly discovered countries.... is equally agreeable to the dictates of humanity and sound policy, and might prove in the result advantageous both to navigation and commerce⁴⁰.

The government took action in 1787 when the conditions of the gaols and hulks were at their worst. The convict population, although domestically a nuisance and a potential danger, constituted nevertheless an enormous pool of labour, which the British state was willing to utilise in order to lay the foundations of the new colony in a remote and unknown part of the globe. The task of colonising such a place was by no means safe or without hazards and risks, so the labour under these circumstances had, of necessity, to be forced. Convict labour had been for long accustomed to this type of exploitation because of its basic disposability. The resumption of transportation did not so much help the alleviation of the conditions in the prisons, as it sacrificed the convict population at the altar of colonial

39. For these plans and many other similar suggestions in pamphlets and letters, see detailed reviews in O'Brien, Clark and Shaw.

40. Select Committee on Return of Felons, C.J. 1779, XXXVII. It is also important to refer here to the secret instructions given to Cook in 1768 in which he was informed that any discoveries might 'tend greatly to the advancement of the trade and navigation'. See Shaw, op.cit., p.52.

strategy at its first and most risky stage. An anonymous pamphleteer had observed in 1787, that by having their lives or liberties 'forfeited to justice'

criminals have always been judged a fair subject of hazardous experiments, to which it would be ⁴¹unjust to expose the more valuable members of a state⁴¹.

While the Select Committee mentioned above remarked that:

...sending atrocious criminals to unhealthy places where their labour may be used, and their lives hazarded in the place of better citizens, may in some cases be advisable, and in the case of capital respites is indisputedly just⁴².

That colonial considerations were not foreign to the new enterprise is obvious in the instructions given to the first Governor of the colony some days before the departure of the First Fleet. In these, Phillip was informed that further batches of convicts were to be sent and that convict labour was expected to exploit the natural resources of the country in order to make it self-supporting. Moreover, land was to be given to freed convicts 'with all convenient speed' on condition that they will reside on it and will farm it. Also, lands were to be given to convicts on their marriage and additional acreage for each child, while women for the multiplication of the population were to be introduced (read abducted) from the Pacific Islands. Also, anybody from the military personnel willing to stay in the colony as free settler could do so, and was to be provided with land and other provisions. As far as the imperialist motives were concerned, Phillip was instructed to make explorations and to settle Norfolk Island as a place potentially

⁴¹ Anon. The History of New Holland, London, 1787, quoted by O'Brien, op.cit., p.183.

⁴². Select Committee on Return of Felons, loc.cit., p.XXXVII

useful for the future and also to prevent its occupation by any other power. Therefore, the convicts were the 'pioneers' who cleared the roads and the vanguard who paved the way for the bulk of settlers and colonisers to follow⁴³.

Nevertheless, transportation was a punishment and intended to be one. Under a criminal law which was the personification of terror, this punishment was supposed to have a strongly deterrent effect both generally and individually. Of this all concerned were well aware, especially during the early years of the policy, when batches of convicts were removed from a deplorable situation at home to a more terrible destination abroad. At the same time, as we have already seen, transportation helped to a great extent in easing the congested situation in the prisons, and this advantage of the measure was widely praised before and after the resumption of transportation.

The need to empty the gaols, the need to punish, and the need to add another colony in the imperial constellation, the short-term and the long-term objectives, the explicitly stated aims and the underlying politics of the scheme were never clearly delineated; they were confused in the minds of the officials of the Government at home and the Governor's administration in the colony; indeed, even in the mind of the Governor himself. He thought that he had been sent as a 'gaoler' (as he interpreted the instructions given to him), but he complained about this, because he wanted to found a colony rather than a gaol, and he

43. For the Commissions and Instructions to Phillip, see Histor. Records of New South Wales, Vol.I,ii, pp.24,61,85.

did not want 'convicts to lay the foundations of an empire'⁴⁴.

The Transported Convicts

It is of great interest to examine who were the transported convicts, what crimes had they committed and, generally, which was the common characteristic, if any, that differentiated them from those who sent them far away to Australia. This examination, together with a brief outline of the political, social and economic conditions in the metropolis during the years immediately before and after the resumption of transportation will hopefully provide a clear picture of the wider function of transportation as a form of punishment in helping the dominant 'classes' of eighteenth century Britain to preserve the domestic order and their economic and political interests. It is suggested here that through transportation thousands of convicts, being the victims of an oppressive system at home, were conveniently dumped to the new colony, 'that dustbin of the unwanted and the unsuccessful', according to E.J. Hobsbawm's apt metaphor⁴⁵, as the waste by-products of an oligarchic society making its first steps towards full industrialisation at the second half of the eighteenth century.

The apparent difficulty in finding and analysing the records of all those convicts transported to Australasia between the years 1787-1852 led L.L. Robson to study the characteristics of the convict settlers of Australia by using a sampling

44. Even the 'reformatory' advantages of transportation were often emphasised especially later. See A.G.L. Shaw, *Some Reformatory Aspects of Transportation*, in Morris & Perlman (eds), Law and Crime, New York, 1972, pp. 135-154.

45. E.J. Hobsbawm, op.cit., p.84

technique of a few thousand records only, which gave the following general picture: half of all those transported (total 163,021) were sent out for 7 years and a quarter for life; two convicts out of every three were tried in England, one out of three in Ireland and a few in Scotland and abroad; the average age of the convicts was 26 years and approximately 75% of them were single; nearly all of them were from the labouring classes; certainly one half and probably two thirds had formerly been punished usually for forms of theft; eight out of every ten were transported for larceny of various kinds⁴⁶.

From the characteristics referred to above, of particular importance for our discussion are those two we have underlined: the totality of the transportees were members of the lower classes, while the great majority of them were punished for some form or other of crimes against property. Another historian, after examining the records of transportees came to the conclusion that:

Overall most of the convicts were not the 'atrocious villains' so often spoken of though some of them were; but most were ne'er-do-wells, stimulated to crime by low wages, a bad poor law, bad living conditions, periodical unemployment, lack of education and a non-existent family life⁴⁷.

The observations of a more recent historian depict in a more vivid description the nature of the first convicts sent away in the following quotation:

... the majority of the first British Australians were from one class - the poor - and, among the poor, from the lowest and often criminal strata. The poverty of these emigrants is more significant than their crimes; there

46. L.L. Robson, op.cit., passim.

47. A.G.L. Shaw, The Convicts and the Colonies, p.164

is more to be learned about Australis's first settlers from the social environment in which they had lived in Britain than from the crimes for which they were transported. There were some exceptions, but what most convicts had in common was their poverty; their crimes varied, their poverty was universal. ⁴⁸ Indeed much of their crime was a product of their poverty ⁴⁸.

We shall not try here to establish causative links between poverty and crime ⁴⁹, because it suffices for us to say that almost all transported convicts belonged to 'that conglomerate mass of human misery' called 'the poor', as Charles Wilson has characterised them ⁵⁰. The same author informs us that this name was the 'collective title by which the least fortunate of the lower orders of society were known', and that 'their order and welfare formed far the largest and most frightening social problem that faced central and local government in any period'. Some estimate that about a quarter of England's population at any time up to the Industrial Revolution were 'in a state of chronic poverty, a proportion which could double in periods of harvest failure or depression' ⁵¹. Therefore, the chronic destitute and the potentially destitute, amounted to half of the English population.

48. R.M. Hartwell, The British Background, in G.J. Abbot & N.B. Nairn (eds), op.cit., p.31-32.

49. We have already suggested that poverty and other 'social problems' are here taken not as direct causes of crime, but as indeces of the unequal and oppressive relations of capitalism (and feudalism). See our Chapter 2 above.

50. Ch. Wilson, op.cit., p.346

51. ibid. p.231. R.M. Hartwell, Consequences of the Industrial Revolution in England for the Poor, in R.M. Hartwell et al.(eds), The Long Debate on Poverty, The Institute of Econ. Affairs, London, 1972, p.15.

Britain in the Late Eighteenth Century

The Socio-political Context⁵²

Having seen the composition of the human cargo of the convict ships and the wider circle from which they were drawn and put away, we shall now see the structure of the upper 'orders' of the English society at that particular period and the way in which they were trying to preserve their privileged position and repress every effort of the under-privileged strata to question or threaten the then existing social order and the interests of those who ruled. Many of the points raised in the following section of this chapter hold true for almost the whole of the eighteenth century, while others emerged in a more intense form after the French Revolution and the ensuing panic which befell on the ruling aristocracy here. So, for example, it is true that during the whole eighteenth century government was founded upon landed proprietorship, while, due to the fear of Jacobinism the system of 'criminal justice' became more repressive in the final decades of that century. The focus of that section will be on the period of time around the year of the resumption of transportation to

52. Our analysis in this and the following section has been heavily indebted to many economic and social histories of Britain in the post-Industrial Revolution period, particularly to Fr. Engels, The Condition of the Working Class in England, Moscow, 1973 (originally published in 1845), J.L. & B. Hammond, The Village Labourer, London, 1911, idem., The Town Labourer, London, 1917, E. Halévy, A History of the English People in 1815, Penguin ed, 1938 (originally published in English in 1924), a selection of papers by Marx and Engels, On Britain, Moscow, 1978, T.S. Ashton, The Industrial Revolution, O.U.P., 1948, A. Redford, The Economic History of England, 1760-1860, London, 2nd Ed., 1960, E.P. Thompson, The Making of the English Working Class, London, 1963, T. Burns & S.B. Saul (eds), Social Theory and Economic Change, Tavistock Publ., Univ. of Edin, 1967, E.J. Hobsbawm, op.cit., E.J. Hobsbawm & G. Rudé, Captain Swing, London, 1969, Brian Inglis, Poverty and the Industrial Revolution, London, 1971, J. Clifford, Economic Aspects of Development, 1760-1960, London, 1967.

Australia.

The characteristic which dominated the political life of Britain at that period was the 'landed interest'. According to Hobsbawm 'to belong to the upper classes meant to own an estate and a 'seat'. Landownership was the price of entry into high politics... The large landowners were rich and powerful and the rich and powerful were landowners'⁵³. Blackstone's famous statement that the House of Lords was an assembly of landowners and the House of Commons an assembly of those landowners who had not a seat in the House of Lords constitutes a vivid illustration of the power distribution in Britain. Since land was the main qualification for a political career, the new monied classes, manufacturers, merchants and industrialists were investing great sums of money in land in order to facilitate their own or their children's ascent to the ranks of the governing aristocracy. The two great political groups of the period, Whigs and Tories, although quarrelling for the power to govern, were essentially different factions of the same political orientation. The Tories relied more on the support of the gentry, while the Whigs were more aristocratic and were dominated mainly by noble families. Although these two parties succeeded each other in power and in opposition, the interests of the landowners as a whole were well secured and preserved. It is estimated that these upper orders, the familiar constellation of monarchy, aristocracy, gentry and to a lesser extent the great merchants, did not amount to more than 3% of

53. E.J. Hobsbawm, op.cit., pp.97-98.

the whole population. This minority of people constituted together the ruling oligarchy, with power to impose their will upon the overwhelming majority of the inhabitants of the Kingdom. Efforts at constitutional reforms and extension of the franchise were always destined to failure because of the well secured and entrenched power of the rulers. Lord North provided the best justification of the dominant view that the legislative power ought to be 'in the hands of the country gentlemen' when he rejected a reforming Bill on the ground that the constitution was 'the work of infinite wisdom... the most beautiful fabric that had ever existed since the beginning of time',⁵⁴.

Since property was the quintessence of political life in Britain, it is not surprising to see it being officially deified and becoming the measure of all things. Douglas Hay in his paper Property, Authority and the Criminal Law emphasises that 'even human life was weighted in the scales of wealth and status... Again and again the voices of money and power declared the sacredness of property in terms hitherto reserved for human life',⁵⁵. This explains the fact that capital offences increased from about 50 in 1688 to over 200 before 1820; and the fact that almost all of them were offences concerned in one way or other with property. In a list compiled by Colquhoun in 1795 we find

54. Parliamentary History, Vol. XXV, p. 472.

55. D. Hay, Property, Authority and the Criminal Law in Hay et al (eds), Albion's Fatal Tree, London, 1975, p.19.

that not only such crimes as murder, arson, treason etc. were punished by death, but also other trivial ones like 'privately stealing or picking pockets above one shilling', 'maiming or killing cattle maliciously', 'breaking down the head of a fish pond', 'cutting down trees in an avenue, garden etc.',⁵⁶. Needless to say, if such offences were punished by death, much more trivial ones were punished by transportation either for life or for fourteen or seven years.

It was through the legal system and especially through the criminal law that the ruling class of property holders tried to eliminate or reduce threats to its privileged and powerful position from the vast majority of those unpropertied classes at the bottom of the social ladder:

the criminal law was critically important in maintaining bonds of obedience and deference, in legitimising the status quo, in constantly recreating the structure of authority, which arose from property and in turn protected its interests.⁵⁷

It was a criminal law which served the ruling oligarchy and intended to inspire terror among the 'dangerous classes'.⁵⁸ Yet, since terror alone was not enough to achieve obedience, an ideology was developed around law in general which helped to mould the consciousness of the common men so as to accept peacefully the criminal and penal mechanisms as necessary and just instruments of social order for the protection and welfare

56. P. Colquhoun, A Treatise on the Police of the Metropolis, 1795 (6th ed. 1800, pp 437-444). See also L. Radzinowicz, op.cit. Vol.I, parts 1 & 2, where he concludes that 'in 1785 the death penalty was inflicted almost exclusively for economic offences'.

57. Hay, loc.cit., p.25.

58. It was believed that the greater the terror the greater the deterrent, the greater the physical and mental sufferings, the greater the deterrent. W. Blackstone, op.cit., 13th ed. London 1800, Vol.4, pp.251-2. In the trial of T. Muir in 1793 Lord

of the whole society. This was achieved through a paternalist rhetoric and through a certain exploitation of some aspects of the law which Hay has called 'majesty', 'justice' and 'mercy'. The ideological functions of the legal system and the penal control mechanism help to explain the divergence between a cruel penal code and its discriminate application to a degree that allowed 'the class that passed one of the bloodiest penal codes in Europe to congratulate itself on its humanity'⁵⁹. It is relevant to be emphasised that both judges and jury were selectively appointed and all of them were without exception drawn from the ruling landed aristocracy. They manipulated the law with enormous discretion and for the ultimate interests of the wealthy and powerful in such a consistent way that it looked 'in truth a ruling class conspiracy, in the most exact meaning of the word'⁶⁰. The victims of this conspiracy must be regarded as the bulk of those offenders who followed the path to the notorious gallows of Tyburn tree and elsewhere, or those who were sent eleven thousand miles away to 'the greatest penitentiary the world had ever seen', or those rotting in the intolerable misery of hulks and gaols, or those suffering in

Swinton remarked that 'the sole object of punishment among us is only to deter others from committing like crimes in time coming'. T.B.Howell, State Trials, London, 1809, Vol.23, p. 234. Justifying the death penalty for trivial property offences Fielding asserted that 'no man of common humanity or common sense can think the life of a man and a few shillings to be of equal consideration, or that the law punishing theft with death proceeds with any view to vengeance'. It was 'the terror of example' he suggested, which sacrificed one man 'for the preservation of thousands'. H. Fielding, op.cit., pp.118-120. Colquhoun in the same vein suggested that 'nothing sanctions the punishment of death but the terror of example as a prevention of crime', op.cit., p.453.

59. Hay, loc.cit., pp.48-49. See also our discussion on the ideological function of law in Chapter 2 above.

60. Ibid., p.52.

whipping posts and pillories. When in later years, through initiatives by Romilly and Peel, efforts were made at penal reform, what struck the minds and the hearts of those liberal reformers was not only the primitive cruelty of these laws, but also the fact that because of this brutality, the inconsistencies and the technical defects and loopholes, they defeated their own end by inducing leniency and acquittals for a large number of offenders. In 1826 when Peel introduced a Bill to consolidate the criminal laws stated that such consolidation was necessary not to protect the criminal against severity but to supply 'those omissions in the law which ensure the impunity of guilt'⁶¹. Some years earlier, in 1811, Romilly had argued, on the same grounds, that mitigation of the harshness of the criminal law was likely to facilitate convictions, so that 'offenders instead of escaping with impunity would be arrested in the commencement of their career'⁶². Although sometimes such reform efforts are construed as resulting from philanthropic feelings on the part of specific individuals, it is more accurate to read in them an attempt of the ascending bourgeoisie at rationalising the criminal law and the other penal control mechanisms of the state.

The decades after 1750 which brought to England the Industrial Revolution, also brought the continuous struggle of the subordinate classes against the ruling oligarchy⁶³. It

61. R. Peel's Speeches, London, 1853, p.401.

62. Quoted by P. Medd, Romilly, London, 1968, p.229.

63. E.P. Thompson's massive work remains an invaluable analysis of the social conflicts of this period, op.cit. See also, Thomis & Holt, Threats of Revolution in Britain, 1789-1848, London, 1977 and Stevenson & Quinault (eds), Popular and Public Order, London, 1974.

was not before 1832, with the realisation of a kind of restrained parliamentary reform, that the ascendance of the middle classes was established beyond doubt in the British politics and the labouring class constituted itself as an independent and self-conscious social force. The maintenance of the existing social and political arrangements and the suppression of the revolutionary potential of the lower classes was sought by the rulers in the sanguinary penal code, as well as in other repressive laws which were used in cases of intense social conflict and the ensuing official panic (prohibition of combinations, suspension of Habeas Corpus, prohibition of public agitation, public meetings, illegal oaths, restrictions on the freedom of the press, censure on the literary works and the like). On the other hand, 'the resistance movement to the laws of the propertied' launched by the subordinate classes, took up the form not only of crimes, but also of other collective acts of a strictly 'political' character, like riots and open rebellion occasioned by food and bread prices, turnpikes and polls, excise, strikes, new machinery, enclosures and other grievances culminating in the quasi-insurrection of the Luddists in the early nineteenth century, the East Anglia Riots and others. E.P. Thompson, who has studied the formative years of the English working class came to the conclusion that:

One may even see these years (second half of the 18th century) as ones in which the class war is fought out in terms of Tyburn, the hulks and the bridewells on the one hand; and crime, riot and mob action on the other.⁶⁴

64. E.P. Thompson, op.cit., p.64

The Industrial Revolution and its Aftermath

We have seen so far how political power was distributed in the second half of the eighteenth century between the various 'ranks' of British society and how this social order was maintained intact in favour of the ruling class. Not only was the distribution of power that made the gulf between the ruling aristocracy and the lower classes enormous; it was also the distribution of wealth and other inequalities which made the social gulf between the upper and lower strata unbridgable. Through various ways, and by exploiting the circumstances in their favour the rich were becoming richer and the poor poorer in a country hastening her steps towards industrialisation and becoming 'the workshop of the world'. We shall see in the following section some of the more important changes that took place at the period under examination and how these changes affected the lot of the mass of people, pushing them to further degradation and leading them to more crime⁶⁵.

The end of the eighteenth century saw the extinction of a whole class of agriculturists, namely the yeoman farmer. In 1700 there had been about 180,000 freeholders in England, but

65. We have already shown that poverty itself is not taken here as a direct cause of criminality but as an index of the social conditions in a particular social formation and as a symptom of a broader social malaise whose root is found in the unequal and exploitative relations of production in capitalism. However, it must be considered as an advancement from prevailing contemporary theories of individual fault that crime came to be considered by progressive social theorists as a result of wider socio-economic situations. Today it is increasingly recognised that crime, along with other forms of action, constituted a type of 'resistance' to intolerable social conditions. See quotation from E.P. Thompson above. Hobsbawm and Rude similarly observe that in the half century between the mid-1790s to mid-1840s the impoverished proletarian 'was left to organise his resistance as best as he might. He could hardly not resist. His situation was such as to make some sort of rebellion inevitable. And indeed from time to time it broke out in various ways'. op.cit., p.xxii (see also pp.34, 49-50, 58).

by 1800 they had literally disappeared. This was due mainly to the enclosure policy, by which small pieces of land were put together and fenced to facilitate improved farming; also, uncultivated and waste land was brought into use. Under this policy agriculture flourished and production greatly increased, but thousands of small freeholders were thrown away as economically unable to cope with the situation and compete with their rich neighbours. Thus, the enclosure movement led to the concentration of land in the hands of the few big land-owners while the dispossessed grew poorer and became either beggars in the towns or provided cheap labour for the new factories. E.J. Hobsbawm thinks that 'enclosures were merely the most dramatic and as it were, official and political aspect of a general process by which farms grew larger, farmers relatively fewer and the villagers more landless'⁶⁶. And he concludes that it was rather this concentration than the enclosures per se which accounts for the degradation of the village poor⁶⁷. The same author argues that:

This concentration took place in open and enclosed country, among new or old enclosures, through expropriation, forced or voluntary sales and especially on the very large new stretches of land brought into cultivation. It would have pauperised a stable population. It was a disaster for a rapidly expanding one⁶⁸.

While the rate of population increase during the first half of the century did not exceed 17 or 18%, in the second half of the century the increase was more than 52%, reaching over nine

66. Hobsbawm, op.cit., pp.102-103.

67. This was the traditional view, held by the Hammonds, op.cit. (1911), p.81.

68. Hobsbawm, op.cit., p.103; also Hobsbawm & Rude, op.cit., p.16. cf. Redford, op.cit. p. 87.

millions at the dawn of the new century⁶⁹. As far as the agricultural labourers are concerned, the historians consider the middle of the century as their best period; but towards the end of the century a period of great economic distress ensued because the prices, and especially food prices, increased out of all proportion to the purchasing power of wages, and because the enclosure movement, while absorbing considerable labour, threw many of the agricultural labourers to the towns, where some of them found work but most of them swelled the slums of the industrial cities in extreme poverty.

Although its origins are much earlier⁷⁰, the Industrial Revolution was definitely taking place in the second half of the 18th century. Industrialisation created a new form of society, industrial capitalism, based on a new form of production, the factory⁷¹. Apart from that, it represented a new economic relationship between men, a new rhythm of life, a new pattern of work discipline. It divided the industrial population into capitalist employers and workers who owned nothing apart from their labour power that they sold for wages. Mechanical inventions, improved transporting facilities and new markets

69. For the causes of population increase, see J. Clifford, op.cit., p.19. cf. Redford, op.cit., p.71 ff, where the rapid increase of population is attributed to a sharply decreasing death rate. For a special study of this topic see H.J. Habakkuk, English Population in the Eighteenth Century, Econ. Hist.Review, Dec. 1953, pp.117-33.

70. For the origins and the causes of the Industrial Revolution see R.M. Hartwell, (ed), The Causes of the Industrial Revolution; Methuen, London, 1967. Also Hobsbawm, op.cit., Ch.2.

71. So far the description and critique of the industrial capitalist society provided by Marx in his Capital is unsurpassed. The effects of Industrial Revolution have been for some time a highly controversial issue. Two 'schools' have been formed: the 'pessimists' (Toynbee, Webbs, Hammonds, Hobsbawm, Thompson etc.).

at home and overseas gave an impetus to industrial and economic growth and increased the wealth of the nation. Since we are interested here much more in the human and social consequences of industrialisation, we shall not concern ourselves with its economic results. According to some social historians, not all social classes were affected in the same way by industrialisation. The British aristocracy and gentry were very little affected, except for the better. Their social predominance remained untouched, their political power in the countryside complete. Equally placid and prosperous were the lives of the numerous 'parasites of rural aristocratic society, high and low',⁷² meaning the various functionaries of the nobility, churchmen and men of universities, judges and lawyers. The great industrialists found their way upwards and were assimilated into the landed oligarchy, while the great mass of men 'rising from modest, though rarely from really poverty stricken, beginnings to business affluence',⁷³ recognised themselves increasingly - and after 1830 generally - as a 'middle class', and not merely as a 'middle rank' in society⁷⁴. But although industrialisation fundamentally changed their lives, it did not disorganise them.

and the 'optimists' (Clapham, Ashton, Hayek, Hartwell etc.). For a nice review of the relevant literature see the Foreword in Br. Inglis' work referred to above (originally published as an article in the Encounter).

72. Hobsbawm, op.cit., p.81

73. ibid., p.83

74. For the origin and meaning of this term, and the development of the concept of 'class', apart from the relevant Marxist literature, see Asa Briggs, The Language of 'Class' in Early Nineteenth Century, in A. Briggs & J. Saville, ^(eds) Essays in Labour History, London, 1967, pp.43-73.

The class more deeply affected by industrialisation was that of 'the labouring poor - in the nature of things the majority - whose traditional world and way of life the Industrial Revolution destroyed, without automatically substituting anything else'⁷⁵. It transformed them from servants and men to 'operatives' and 'hands', it imposed on them the mechanised regularity of work and 'the tyranny of the clock' to which they were unaccustomed⁷⁶, it destroyed the environment in which work and residence were taking place by helping the emergence or growth of smoky and filthy industrial towns all over the country, and finally it destroyed the traditional links which helped somehow keep society together by widening the social distance between capitalists and proletarians not only in a political sense but also in the every day life and in the simple relations between 'superiors' and 'inferiors'⁷⁷. The new class of industrial capitalists, as Marx pointed out:

... has pitilessly torn asunder the motley feudal ties that bound man to his 'natural superiors' and has left remaining no other nexus between man and man than naked self interest, than callous 'cash payment'... In one word, for exploitation, veiled by religious and political illusions, it has substituted naked, shameless, direct brutal exploitation⁷⁸.

This exploitation was evident not only in the lower employment standards in every kind of work, but also in the

75. Hobsbawm, op.cit., p.84

76. Time and its tyranny on the industrial proletariat are examined, in the usual eloquent style, by E.P. Thompson in the article: Time, Work-Discipline and Industrial Capitalism, Past and Present, Vol. 38, Dec. 1967, pp.56-97. Also S. Pollard, Factory Discipline in the Industrial Revolution, Econ.H.Rev., 1963

77. Thompson, op.cit., pp 221-222 for a succinct summary of the effects of industrialisation upon the working people.

78. Marx & Engels, Manifesto of the Communist Party, Moscow, 1973 (originally published in 1848) p.44.

composition of the labour force itself, which consisted mainly of women and children. Even in 1838, after so many efforts at reform, and after many regulations concerned with protection of these two groups, the adult male proportion of the whole labour force did not exceed 23 per cent. The conditions under which children of every age over three years were employed, especially in mines and as chimney-sweeps, or the process by which the children were 'hired-out' from workhouses to factories, for a working day as long as sixteen hours, is too well known to be repeated here⁷⁹. No real reform took place until 1840. Some consider that 'from the ranks of this forlorn body the criminals of future generations arose'⁸⁰.

Not only were the employment standards degrading the labouring classes but the permanent conditions of under employment at that time were also pauperising them, with the consequence that they had to rely on poor relief for survival. It was not until 1795 when 'fear and pity' of the poor after the French Revolution led to the famous Speenhamland system of relief, under which a minimum wage for the support of a man, his wife and family was laid down with the added provision that if wages fell short of it they should be supplemented from the poor rates. Bad administration, however, and the Anglo-French war of 1793 increased pauperism in England and greatly demoralised the labouring and lowest classes⁸¹.

79. See Hammonds, The Town Labourer, esp. Ch. 8 and 9.

80. O'Brien, op.cit., p.42.

81. For the history of the Poor Law, old and new, the study of the Webbs remains an invaluable work. See S. & B. Webb, English Poor Law History: Part I: The Old Poor Law, London, 1927. For a critique of the system of the Old Poor Law see also Hobsbawm, op.cit. p.88ff, Hammonds, The Village Labourer, p.141: 'The Poor Law which

Poverty and crime were regarded as closely linked by various thinkers of the time. The celebrated London magistrate, Henry Fielding, writing in 1751, described the miserable conditions under which the poor were living and found it surprising that only so few of these wretched had become criminals⁸². Four years later he made the well-known statement:

...the sufferings of the poor are indeed less observed than their misdeeds: not from any want of compassion, but because they are less known; and this is the true reason why we hear them so often mentioned with abhorrence and so seldom with pity. They starve and freeze and rot among themselves, but they beg and steal and rob among their betters..⁸³

Forty years later, another famous London magistrate, Patrick Colquhoun, considered the prevailing indigence 'as a principal cause of crimes' and deplored the fact that one out of nine British inhabitants was poverty-stricken. He, himself, as other previous thinkers, severely criticised the administration of the Poor Law system and thought of it as a cause increasing poverty rather than diminishing it⁸⁴. The bad condition of the poor in Britain was one of the main reasons why opponents of transportation considered it as an undesirable method of punishment. They regarded it as not sufficiently deterrent, for it gave the opportunity to the poor to improve their lot and their standard of living in the new colony, and thus end 'better off' than the honest multitude languishing in abject misery.

had once been the hospital became now the prison of the poor. Designed to relieve his necessities, it was now his bondage' Also Hobsbawm & Rude, op.cit., pp.30ff.

82. H. Fielding, Enquiry into the Causes of the Late Increase of Robbers, London, 1751.

83. Quoted by Eden, The State of the Poor, London, 1797, p.61

84. P. Colquhoun, op.cit., (passim).

Summary

Gathering together the various threads of argument concerning the motives behind the resumption of transportation, we could say that transportation had a multi-dimensional significance both for the domestic and international function of the British state at the second half of the eighteenth century: it relieved Britain of her criminals, it emptied her gaols, it reduced the social unrest and tension among the lower classes, and helped the colonial expansion of Britain to the vital for her interests South Pacific. In due course, the colony became a convenient outlet for the redundant labour force of the mother country, and for the poor masses of the British society. It is relevant to note here that in some original proposals Australia was intended to become a receptacle not only of criminals but also of other unwanted elements, like the American loyalists, who after the end of the Anglo-American War swarmed into the towns and the villages of Britain and swelled the ranks of the unemployed and the poor. Both these populations - convicts and American loyalists - being a burden and a problem to the mother country constituted waste material for the existing system which had to be disposed of in one way or the other. The long life of transportation as a method of punishment says a lot about the benefits to the mother country resulting from its operation. Transportation had a salutary and in many senses 'patriotic' effect on colonial Britain, something which did not escape the attention and the pen of a sarcastic convict-poet, who wrote:

From distant climes, o'er wide spread seas we come
though not with much eclat, or beat of drum
True patriots all; for be it understood,
We left our country for our country's good⁸⁵.

Transportation and the ideology of the penal thinkers

A word must be added here about the ideologies of the penal philosophers of the day, especially their thoughts concerning transportation as a form of punishment. It is suggested that these ideas helped the ruling classes to legitimise and justify the existence of a penal system which aimed at the intimidation of the masses through sheer terror. In the previous section we have seen how the powerful manipulated the instrument of criminal law for their own interest, in a way which enabled them to demand and to receive the respect for the law of those very people who were oppressed by it. This was achieved both by developing an ideology about law, which presented it as 'above classes' and veiled reality with a paternalistic rhetoric, and also by shrewdly administering the criminal justice system. In this section we shall outline the opinions of some of the more influential penal thinkers in the second half of the eighteenth century, with particular reference to their attitude to transportation, and see how their desire for more severe and deterrent punishments was in line with the theory, if not the practice, of the penal system

85. This is Henry Carter's poem supposed to have been spoken at the opening of the first theatre in Australia in 1796, quoted by Ch. Bateson, Convict Ships, Glasgow, 1959, p.3. J.D. Lang characterised transportation as 'the most interesting and the noblest experiment that had ever been made on the moral capabilities of man'! See his Historical and Statistical Account of New South Wales, London, 1875, 4th ed. (First edition 1834), p.12.

of the country⁸⁶.

Two clerics, Martin Madan and William Paley, represented in a very characteristic way the prevailing philosophy on law and punishment. In 1785 Madan published the work Thoughts on Executive Justice with Respect to our Criminal Laws in which he argued that the only 'complete and adequate redress' of criminality is a strict application of the rigours of the law, because it was this rigour, together with its strict execution, that produced fear as the best prevention of crime; he was implicitly asking for a more severe penal code. As regards the administration of the system, Madan was seriously against the practice of reprieving death sentences and granting pardons, because these methods were likely to diminish the rigours of the law. Death sentence was of maximum significance for the penal theory of Madan, and any commutation to transportation or imprisonment in the hulks was rejected as insufficiently deterrent⁸⁷. This was the penal philosophy of an 'uncompromising lawyer turned divine' as it has been expressed in this work, which, though of no particular literary value, was much read in his time, and, as O'Brien remarks, 'led to a brief outburst of judicial butchery'⁸⁸.

William Paley more than anyone else 'held back the rising tide of opinion in favour of criminal law reform'⁸⁹. Like Madan

86. For a comprehensive review of contemporary penal ideas see L. Radzinowicz, op.cit., Vol.1 (passim). Also, C. Phillipson, Three Criminal Law Reformers: Beccaria, Bentham, Romilly, 1923 and especially J. Heath, Eighteenth Century Penal Theory, London, 1963.

87. M. Madan, Thoughts on Executive Justice with Respect to our Criminal Laws, London, 1785.

88. O'Brien, op.cit., p.100

89. O'Brien, op.cit., p.101

he stressed the importance of the certainty of punishment, without, of course, having low esteem towards the customary brutal severity. He approved of the prevailing English system of criminal law, praising its peculiar merit of combining heavy severity with an amount of discretion, thus succeeding to simultaneously impress fear to all and save the lives of some. He especially disapproved of transportation, as being a very imperfect deterrent, because it was only a slight punishment to those with no great stake in the mother country, and because whatever pains the transported convicts were going to suffer they were too far away from Britain to influence potential criminals. He was against torture, but only because it was likely to lead to sympathy for the victim; also, his great concern was to find a punishment harsher than death itself. He went so far as to propose a plan of 'casting murderers into a den of wild beasts, where they would perish in a manner dreadful to the imagination, yet concealed from the view'⁹⁰. This was the mentality of a man who was a Christian archdeacon and a disciple of Beccaria! Nevertheless, he was expressing exactly the attitude to, and fear of, an increasing criminal population on the part of the governing oligarchy, as neither Tyburn nor transportation to America had managed to stop the volume of crime. Paley eloquently justified the existing system and amply supplied the upper strata, especially those in the House of Lords, with arguments that slowed the movement forward in penal reform well until the third decade of the next century.

90. W, Paley, Principles of Moral and Political Philosophy, ed. 1785, pp.290-296.

Meanwhile, some other disciples of Beccaria made more strenuous efforts to apply in this country the teachings of their master. They almost all opposed the extreme severity of the law and they proposed the abolition of the death sentence for some minor crimes as a first step to reforming the penal system. Their efforts met with heavy opposition from the rulers, so that when Romilly, some decades later, tried to remove the death penalty for the offence of stealing from a shop to the value of five shillings, the famous Lord Ellenborough expressed the hope 'that the laws which a century had proved to be beneficent would not be changed for the illusory opinions of specialists',⁹¹. Beneficent for his class to be sure but Blackstone, although looking at the British constitution 'through rose-tinted glasses' and remaining convinced that the English legislature was as good as it could be, since it 'in the course of a long and laborious process extracted by noble alchemy rich medicines out of poisonous ingredients',⁹² found it more difficult to justify the frequency of capital punishment in the criminal laws (in his time some 160 different statutes). Another reformer, William Eden, thought that the criminal code needed reform, but he was rather cautious and confined himself along with Blackstone to the study of penitentiaries. Eden condemned the severity of the English law because 'the excess of the penalty flatters the imagination with the hope of impunity',⁹³. He criticised the perfunctory nature

91. Quoted by O'Brien, op.cit., p.91.

92. Blackstone, Commentaries, 17th ed., Bk.IV, Ch.1, pp. 3, 18.

93. Eden, Principles of Penal Law, ed. 1775, pp.6-28.

of the criminal laws, and for the death penalty he had to say that it should be used not as a punishment but as a 'melancholy resource' to exterminate those dangerous to the public safety. Transportation he condemned on utilitarian grounds as being too often beneficial to the criminal and as costing the kingdom a subject without working as a deterrent to others. He also disapproved of ordinary imprisonment because of its demoralising effects on prisoners. His attitude towards the criminals themselves is shown by his proposition to employ the criminals in dockyards or in mines or even to send them to Tunis or Algiers in exchange for the Christian slaves of the Corsairs⁹⁴.

No account of the penal thinkers of the time, though as sketchy as this, will be complete without reference to Jeremy Bentham, who concerned himself for all of his life with issues of penal interest either in the level of intellectual exercise or in practical life⁹⁵. In Bentham utilitarianism found its most fervent apostle. The result of all his labours was the invention of the Panopticon, a penal institution specially constructed to reiterate his theoretical teachings. But if his 'panopticon' never materialised the ideas of Bentham had largely led to the erection of penitentiaries as new penal establishments. Bentham's writings on penal matters cannot be so easily simplified, as they constitute part of his general philosophical thought, but a few points may be outlined here: the law must seek the greatest happiness of the greatest

94. ibid, pp.50-52

95. For a summary of Bentham's views, see C. Phillipson, op.cit.

number. This can be achieved, since love of pleasure and fear of pain are basic motives of human conduct. Punishments are evils on those guilty of an act forbidden by law and inflicted with a view to preventing the occurrence of similar acts. Bentham tried to combine within the same punishment the aims of deterrence and reformation of the criminal, but the latter only as a secondary object. He strongly favoured the environment of a solitary confinement and 'directed his attention to the methods whereby a prison regime could weaken those tendencies which most frequently disposed men to crime, and strengthen those habits most conducive to civil obedience'⁹⁶. Transportation Bentham strongly disapproved as having all the disadvantages and none of the virtues of a good utilitarian punishment. Under the early system to America it was too easy for a convict to buy his freedom from the contractor and return before the expiration of his sentence; under the new system to Australia transportation sometimes was transformed to death penalty and this was a 'monstrous aggravation'⁹⁷. Besides the exemplary and reformatory qualities of the punishment were non-existent and it was very difficult for those whose term of sentence expired to return home. He also disapproved of imprisonment in the hulks and gaols of contemporary Britain and planned his own design of prison based on solitary confinement and hard labour, a plan destined never to materialise.

From what we have said above it is obvious that neither

96. ibid., p.204.

97. Bentham, Works, Vol.1, p. 497.

the apologists of the existing system nor the more liberal penal reformers were in favour of transportation as a method of punishment for a great variety of reasons, in particular, for not being deterrent enough. It is relevant to recall here that even Beccaria was opposed to it, since it was a 'distant and therefore useless servitude',⁹⁸ and perhaps it was his influence that shaped the ideas of many of the later penal thinkers. One might ask then at this point: why had transportation been resumed and continued so intensely in the decades to come, when so much opposition was launched against it from such 'experts' as Eden, Bentham and others? And why did Britain not solve her crime problem by erecting more prisons or accepting the plan of Bentham for a Panopticon, but returned to an old penal policy instead? The answer must be sought in the economic and political priorities set by the contemporary state and not in the 'illusory opinions of specialists' even when they constituted mere apologies of state policies. This points from a different perspective to the basic importance of the colonial element in the transportation of convicts to Australia, which we have already emphasised. On the other hand the rulers were enabled to show their essential 'humanity' and 'leniency' because they continued a policy which was opposed from so many quarters as being insufficiently severe and deterrent, thus strengthening their paternalistic image in the minds of the common people and legitimating their privileged position in society.

98. Beccaria, Dei Delitti e Delle Pene, Ch.XIX.

The Foundation of Australia

The Early Years⁹⁹

The early years of the new settlement were years of misery and despair¹⁰⁰. The land was not a paradise on earth, the soil not fertile, the weather conditions in the first two years not favourable to the growing of crops. Hard work on the part of all concerned was hardly rewarded, and the Government stores started to be short of supplies and food. The spectre of famine was hanging over the heads of the first inhabitants of the colony, so that rations were reduced again and again, and martial law was proclaimed to check the situation. Starvation and bad health reduced labour productivity and everything seemed at a standstill. The 'tyranny of distance' was aggravating the metropolitan indifference to the fate of prisoners and guardians alike. The ship, Guardian, left England in September, 1798 with supplies, but unfortunately was wrecked. Considering that the ship would only have arrived at New South Wales in January, 1790, it must be concluded that governmental indifference at home left the starving population of Australia without any further help and supplies for two and

99. For the early years of Australia see the general historical works cited above, especially the detailed studies of O'Brien, Clark and Shaw. From the primary sources we have extensively used the Report of the Select Committee on Transportation, P.P. 1812, II, 341, the Report of the Commissioner of Enquiry (Commissioner J.T. Bigge) into the state of the Colony of New South Wales, P.P. 1822, XX, 448 and some later reports like the Report of the Select Committee on Transportation, P.P. 1838, XXII, 669

100. The First Fleet under the commands of Captain A. Phillip with about 780 convicts and 700 free people of the administration sailed to Botany Bay on March 13th, 1787 and arrived in Australia in January 1788 after a long journey of misery, agony and human degradation. The various private contractors were paid for the numbers embarked and the Governor obtained property on the 'services' of the convicts only after their arrival in the settlement.

a half years! The conditions improved with the arrival of some supplies, but in 1791 they were again intolerable; in later years they were stabilised for the better and the foundations of the infant colony were laid out of the blood and the sweat of the first transportees. By the end of 1791 the population had increased to 4,059 of whom 3,178 were convicts. Two years later the first ever free settlers arrived in Australia. No prisons for the convicts were erected, as 'the ocean was the wall of the prison' and it was 'in fact a tighter prison than any Devil's Island or any fortress on land'¹⁰¹.

Inevitably, the 'peculiar' nature of the new settlement made labour an utmost necessity for the inhabitants in their effort to transform a virgin, wild land to a place suitable for communal life. Obviously the obligation for manual work fell heavy on the shoulders of the convicts, since the military justified their presence with the fulfillment of other duties and responsibilities. So, the convicts were working from dawn to dusk felling trees, clearing grounds, erecting huts, etc. in gangs, either in chains or free. They worked for nothing apart from what they received every day from the government stores. Eventually they were allowed some spare time for rest or private work and later to earn wages.

The System of Assignment

From the early years of the settlement Governor Phillip had made use of his power to 'assign' a number of convicts to the military officers to assist them in clearing grounds and

101. Blainey, op.cit., p.24

other kinds of work. Such assignments were also made to the first settlers who arrived after 1793, and they multiplied of course when many more immigrants sought their fortune in Australia¹⁰². In fact, there were only 81 of them in New South Wales in 1796, but by 1800 there were 402 free settlers. The government at the commencement of transportation did not show much interest in sending free settlers there, but in later years encouraged such migration¹⁰³. It seems, however, that the hazardous adventure to emigrate to a remote and unknown island deterred many potential settlers. With the passing of time increased knowledge of the reality and better opportunities in the colony induced so many that the government had to impose restrictions, especially a minimum of income, a policy aiming at discouraging the poor and encouraging the people of capital and, implicitly, of some respect to settle and invest in the new colony thus helping its economic and moral amelioration¹⁰⁴. The employment of convicts by private settlers was firstly in return of food and clothes and later in return of wages. This meant that these convicts were no more a 'burthen' on the Government stores, a fact that delighted England as it

102. In 1789 Grenville agreed with Phillip's policy to grant lands and assign convicts. Grenville to Phillip, 22 Aug. 1789, H.R.A., I, i pp.124-130. See also Phillip to Sydney, 12.Feb. 1790, H.R.A.I.i p.146

103. In 1792 the Home Secretary, Dundas, informed Phillip that he would give every encouragement to induce certain settlers. Dundas to Phillip, 10 Jan. 1792. H.R.A. I, i, p.332. Such encouragement consisted of a free passage for the settler and his family, large grants of land and convicts to work in the proportion of 1 to every 100 acres, such convicts to be fed and clothed by the government for 18 months.

104. Free passages were abolished in 1814.

transferred the cost of maintenance of convicts from her to private individuals.

Early in 1795 Governor Hunter assigned convicts to various persons at the following rate: to governmental or military officers 10 convicts as farm servants and 3 as house servants; to free settlers 5; to superintendents and store-keepers 4; to settled marines 2; to emancipated convicts 1 and to sergeants of the New South Wales Corps 1 convict¹⁰⁵. When assignment started in 1789 the assigned convicts were fed, clothed and if necessary housed by the government. Under Governor Hunter, however, due to a shortage of labour in 1798 these responsibilities shifted to the private employers¹⁰⁶. The assigned convicts were not allowed to absent themselves without leave, nor were they permitted to go from one settlement to another without a pass from a magistrate. Wages were forbidden at the beginning but later the settlers found that between the lash and the wages the latter were better as a means of discipline and increased productivity. Needless to say the assigned convicts were themselves entitled to other assigned convicts after their emancipation or the expiration of their sentences, if they had been considered 'meritorious cases' for such a privilege. Apart from wages other indulgences had been tobacco, tea, sugar and the much sought after rum.

Therefore in the early years of Australia the labour power of the transported convicts was utilised in two parallel ways

105. J.D. Lang, op.cit., p.60

106. Hunter's Orders, 20 May and 15 Aug. 1798, H.R.A. I,ii, p.215,219.

of forced employment: some of them, especially skilled mechanics, were employed in public works under direct governmental control; others, a few at the beginning of colonisation and in greater numbers later, were assigned to private masters. Assignment arose out of the economic context of Australia and like indenture in pre-revolutionary America constituted an instrument of colonial policy under which surplus convict population was put at the disposal of private interest under conditions of direct domination and exploitation. Although assignment involved only the services of the convict and not his or her person one might justifiably call it a type of slavery. Its duration, of course, depended upon the length of the sentence and did not last for life as in slavery; nonetheless in practice the two differed very little, as Earl Grey reminded his audience some years later:

... the assigned servants were, in fact, slaves, and there is only too painful proof that in many instances the evils inseparable from slavery were experienced¹⁰⁷.

The Select Committee on Transportation of 1838 absolutely rejected the system, because they considered it as a 'vast lottery' under which convicts transported for the same offences had met different fates, as they prospered or suffered according to the disposition of the employer they served¹⁰⁸. It seems that the system was finally abolished in 1841, to the great discomfort of the employers, rather as a result of a growing

107. Earl Grey, Colonial Policy of Lord John Russell's Administration, London, 1852, Vol.2, p.6.

108. Report of the Select Committee on Transportation, 1838, Parl. Pap., p.viii, where a more general discussion on the advantages and disadvantages of the system.

oppositon of the native labouring class than from any severe apprehension of its degrading and servile nature.

The practice of assignment reflected the colonial needs of the new settlement and pursued ends paralleling and crystallising those of transportation as a base institution. Its repressive elements, well beyond the prerequisites of a usual contractual relationship, like the prohibition of absence without permission and the restriction on movement from one settlement to another, pointed to its punitive underpinnings. In this sense, the characterisation of assignment by O'Brien as 'a compromise between colonisation and criminal punishment, welcomed both in England and the colony for economic reasons' seems an exact and proper one¹⁰⁹. From another perspective, assignment may be seen as a type of early conditional release. It constituted a means of discharge from direct governmental control of particular convicts, who were put under the supervision, domination and surveillance of their specific employers and masters, under conditions referring to freedom of movement, location, labour etc., and with the possibility of recall of the assigned convict to the public works.

Land Grants

Another instance of colonial policy and reflection of the economic conditions prevailing in the infant colony had been the practice of allotting land grants to various persons in the colony¹¹⁰. We have seen that the first governor had been

109. O'Brien, op.cit., p.262

110. For a special examination of the problem of land in early Australia, see K.W. Robinson, Land, in Abbot & Nairn (eds), op.cit., pp.74-104.

instructed to grant land to emancipated convicts, victual them for twelve months and equip them with tools, grain and such cattle as might be proper and could be spared. Also he was advised to afford every encouragement to military officers and others disposed to stay in Australia and cultivate the land. Early in 1792 Governor Grose allotted 100 acres to every officer who asked for land, as well as to others of lower standing, like emancipated or discharged convicts and free settlers¹¹¹. As a rule 30 acres of land were granted to every emancipated or discharged convict who stayed there, 20 more acres to a married man and 10 more acres for every child¹¹². They practically obtained land for nothing, adequate cultivation being regarded as a sufficient justification of possession of land.

Absolute and Conditional Pardons

Finally, the same motives which fostered the development of assignment of convicts and land grants were without doubt at the basis of the various kinds of remissions that the Governor had the power to grant. In 1790 the Act 30 Geo.III c.47 conferred upon him the power to 'remit, either absolutely or conditionally the whole or any part of the time or term' for which the convicts had been sentenced. Eventually three types of remission emerged under the names of absolute pardon, conditional pardon and the ticket of leave. The first enabled

111. Grose to Dundas, 16 Feb.1793, H.R.A. I,i,p.416, Return of lands granted in New South Wales, Dec. 1794 to Sept. 1796, in Hist. Studies, Nov. 1951, Vol.5, No.17, pp.69-75.

112. H.R.A., I,i. pp.14-15.

the convict to leave the colony if he so wished as it absolved him from any guilt. The second was given under the condition that the convict would stay in Australia during this time¹¹³. Apart from the traditional notion of 'grace' the economic function implicit in these practices cannot be easily ignored, at least in the case of conditional pardon. Even an absolutely pardoned convict had to work hard to pay his passage, if he had decided to leave at any cost. Obviously, both systems by taking the ex-convicts off the governmental stores were advantageous to the colonial administration from a specifically fiscal point of view. On the other hand, their being granted as rewards acted as an incentive to good behaviour and industry¹¹⁴.

Early Release on Licence in the Form of Ticket of Leave

Ticket of leave was 'an intermediate method of indulgence'¹¹⁵ imbued with the penal and colonial ambiguity that characterised transportation itself. As the other practices in the infant colony we have already sketched above (assignment, land grants, pardons), ticket of leave arose out of the specific economic conditions prevailing in Australia and expressed economic and fiscal considerations on the part of the colonial administration.

113. Most of the pardons were granted on various occasions, particularly on the King's birthday and other holidays at the discretion of each Governor, to those whose behaviour, merit and industry rendered them suitable. On 4 June 1802, Governor King gave 4 absolute and 29 conditional pardons; on 4 June 1803 33 absolute and 67 conditional pardons. On the other hand his successor Governor Bligh (1806-1810) pardoned only 2 during his period of office.

114. The first Governor was empowered to pardon those convicts who from their 'good conduct and a disposition to industry' were found to be deserving of favour. See the Second Commission and the Instructions to Phillip, loc.cit., p.4.

115. O'Brien, op.cit., p.271

This type of early release liberated a convict from the compulsory labour at governmental work or the possibility of assignment and enabled him to live on his own for the remaining part of his sentence, to work for wages and to find his own board and lodging, free in all ways except that he could not leave a particular police district, return to any part of the United Kingdom or any British Colony or exercise any legal rights in the law courts of New South Wales. When a convict ship arrived and the superintendent proceeded to the distribution of the convicts either to governmental works or to private employers, it was usual for convicts with money or property capable of being converted into money or various 'gentlemen' convicts to be granted a ticket of leave on the assumption that they were able to support themselves¹¹⁶. This type of certificate constituted evidence of the Governor's pleasure to alleviate them of the need for attendance at public works and protected the ticket holders against accusations of vagrancy or escape. The indulgence was dependent upon good behaviour and the Governor's pleasure. In the early years of the settlement tickets of leave were granted on many occasions, such as marriage or the arrival of a free wife or husband from Britain. While at the start the indulgence was sometimes given immediately after disembarkation, from 1811 onwards service of a minimum part of the sentence came to be considered as a necessary prerequisite. Granting of tickets was at the

116. See the report by the Commissioner, J.T. Bigge, loc.cit., pp.130-131, 17-18. Also the evidence of A. Riley to the Select Committee on the State of the Gaols, 1819, P.P., Vol.VII, 579, p.69.

absolute discretion of the Governor on the recommendation of a superintendent. Unlike pardon ticket of leave did not absolve the holder from guilt; he remained a convict under the supervision of the government, yet 'off the Government stores'; he was under some legal restrictions (to own land, to trade, etc.), and had to conform with the conditions of his licence, especially to reside within a particular district and to report at specific intervals to the police. For any violation of the conditions his ticket was revoked and the holder returned to government labour. In 1806 Governor King added that the licence might be revoked 'if he demands extortionate pay for his labour or transgresses any of the rules or orders of the colony',¹¹⁷.

In subsequent years the whole practice of granting tickets of leave was further refined and more strictly regulated although abuses and misuses of the system were by no means rare¹¹⁸. Especially the indiscriminate and excessively early release was checked through legal provision of necessary minima, so that convicts transported for seven years were eligible for a ticket of leave after a term of four years, those transported for fourteen years after six years and those

117. Ticket of leave Regulations, 10 Oct. 1801, 28 Oct. 1802, H.R.A. iii, P.48 and iv, p.326. Report of Select Comm. on Transportation, 1812, Parl. Pap., evid. Hunter, pp.47-8. For form of ticket in 1806, see H.R.N.S.W., vi, p.47. The Regulations by Macquarie were further tightened up in 1823. In 1826 Darling forbade ticket holders to be assigned a convict servant or to hold a publican's licence. Men who 'habitually' neglected divine service, if within five miles of a place of worship were to be reported; on the other hand, tickets might be granted early to those who assisted in capturing offenders or gave information about them. See Shaw, op.cit., pp.229-230.

118. Transportation Report, 1838, p.xvii. The Committee was generally in favour of the ticket of leave because it had 'useful and beneficial' effects.

for life after eight years¹¹⁹. Also, at a later stage of development in New South Wales, the Governor appointed special boards consisting of three magistrates for the granting of tickets. The principal board was that of Sydney which also examined cases referred to it by the boards of other districts¹²⁰. The absence of clearly defined criteria for release was then, as today, conspicuous. Apart from social standing, wealth and the social occasions we have already mentioned tickets of leave were granted as rewards for good behaviour or noted industry.

The supervisory element of ticket of leave was undeveloped and subservient to the colonial character of the whole practice. The main purpose of supervision was to ascertain that the ticket holder resided within a particular district of the settlement during his licence. It had been considered sufficient in this respect that the ex-convict reported to the police at specified intervals and at least at the beginning of each month or presented himself to the various musters that were taking place in the colony especially in its early years. In the case of assigned convicts supervision was directly exercised by the private employers and related to the complete observation on the part of the convict of the whole network of responsibilities implied in this peculiar form of penal servitude. Although a controlling function was implicit in the various restrictions

119. By the Act 2 & 3 Will. 4, c.62.

120. See evidence Stephen to the Select Comm. on Secondary Punishments, 1832, P.P., vii, 29, p.547.

on movement and action in both systems, it was only much later that ticket of leave took up a controlling and repressive character as a primary and dominant property¹²¹.

The Functions of the Ticket of Leave

The punitive and colonial aspect of transportation that shaped the early history of Australia gave the ticket of leave the essential ambiguity and multidimensional function which is apparent in the variety of objectives the system was intended to attain. From the beginning, ticket of leave was granted to those able to support themselves on the explicit condition that they would be dispensed from government work and live on their own and 'off the government stores'. The primary objective of this policy was to relieve the colonial administration from those able to fend for themselves and therefore reduce the cost of convict maintenance in the colony. The fiscal significance of the ticket of leave for the colonial government and for the British state was thus prominent, especially in view of the fact that it was compatible with the colonial character of the settlement. Like the system of assignment, ticket of leave reflected the particular state of the productive relations in that peculiar colony and emerged from the start of colonisation as a policy under which a surplus convict population was discharged from direct governmental exploitation and was channelled to the free labour market, with the twin objectives of reducing governmental costs and supplying

121. As we shall see in the following chapter e.g. in Ireland, the supervisory and controlling element of the early release on licence there dominated over its liberating element.

working hands for the economic development of the colony, either in the form of operatives or in the form of self-employed. That the colonial aspect of the ticket of leave overdetermined its punitive character is evident in the case of the 'gentlemen' or 'propertied' convicts who were granted tickets on proof that they could support themselves, without any regard to their criminal status. On the other hand, skilled professionals or other convicts needed for the governmental works were not likely candidates for a ticket of leave, since their indispensability weighted heavier than any other consideration. Furthermore, revocation of a ticket of leave was possible as a result either of any misconduct or of the fact that the holder's labour or his skill were urgently needed for the public works, notwithstanding his excellent behaviour during the period of licence.

Even the conditional element of the ticket of leave was largely determined by its colonial aspect, the main condition of the indulgence referring to residence within a particular district of the colony. Together with the practice of assignment and the grants of land, ticket of leave constituted a means by which the convict population - as part of the population at large - was distributed to the various districts in a more or less regulated manner, on purpose to both disperse the criminal population as such and manipulate the mobilisation of the labour force within the colony as a whole, the assumption being that the concentration of convicts 'will infallibly be a concentration of vice and villainy, profligacy and misery, dissipation and ruin'¹²². Apart from the moral implications,

122. J.D. Lang, op.cit, p.140

such a policy of divide et impera helped the even development of the various parts of the country.

The power to issue tickets of leave was never questioned, but the number of tickets actually granted depended on the policy of every particular Governor. Between 1810 and 1820 only about one fifth to a quarter of those qualified by time were given tickets, while between 1825 and 1836 the porportion was still about one fifth of those eligible¹²³. These numbers reflect the importance set by the government upon assignment and the continuation of the public works, as alternative methods of exploiting convict labour. Ticket of leave had to compromise with the other means of colonial policy and in no way was intended to eliminate the convict population under direct governmental control. In this way it reflected the fundamental need of the colonial administration to reduce the number of convicts in the government's charge for fiscal reasons but not beyond the point that would bring the public works to a virtual standstill. Administrative considerations were instrumental and decisive, while pure punitive concerns, at least at the beginning, were only secondary.

In the original text of instructions given to the first Governor of Australia, he was advised to emancipate from their servitude any of the convicts who should by their good conduct and a disposition to industry be deserving of favour¹²⁴, while in 1790 he was given legal power to remit absolutely or conditionally the whole or part of the imposed sentence¹²⁵.

123. See Shaw, op.cit., pp.84, 230.

124. H.R.N.S.W., I, ii, pp.24, 61, 85.

125. 30 Geo.III, c.47 (1790), in Statutes at Large, Vol.16.

Ticket of leave emerged as a method of remission although it did not lead to the emancipation of the convict. As in the case of pardons, it was frequently given as a 'reward for good conduct and a disposition to industry' and thus operated as an incentive to orderly and industrious behaviour for a labour force which was not distinguished for its diligence and acquiescence. Four months after the arrival of the First Fleet the Governor started complaining about the little labour drawn from the convicts in a country which required their greatest exertions¹²⁶. The difficulty to exact labour from the convict population had been a source of constant anxiety for the government. It was a predictable situation with such human material 'who dreaded punishment less than they feared labour'¹²⁷, and to whom any attempt to 'bully, cajole, flatter or coax' to work made no impression¹²⁸. Material rewards like wages, various indulgences, remissions of sentence and tickets of leave were designed to diminish the impact of the enforced labour felt by the convicts and attract them to a more willing and less loathsome attitude to work. Indolence and poor quality of workmanship led the officials to the invention of such incentives and indulgences on the one hand and coercion or the use of the lash on the other in their attempt to fulfil what Clark has called their 'Sisyphean task' of extracting labour force from the convicts¹²⁹.

126. Phillip to Sydney, 15 May 1788, H.R.A. I,i, pp.32,35

127. Phillip to Grenville, 17 July, 1790, ibid., pp.195-196.

128. Phillip to Sydney, July 1788, ibid., p.67.

129. Clark, op.cit., p.119

Some years later Governor Macquarie made explicit regulations that tickets of leave were to be granted to 'such persons as have by a long and uninterrupted period of good conduct and sincere contrition for past offences evinced themselves of such favour and indulgence'¹³⁰, but he, himself, violated his rules and frequently granted tickets to 'such gentlemen convicts as can by their industry or finances maintain themselves without being burdensome to the Crown'¹³¹.

Apart from being an incentive to industry and good conduct or a reward for such behaviour, ticket of leave acted as a 'stick' to good behaviour during the period of licence with the possibility of revocation it included and thus helped maintain order in the colony. Contemporary witnesses observed that 'convicts are persons so anxious to get them (tickets) that when once obtained they are careful of their future conduct'¹³². This was one of the main reasons why many employers preferred ticket of leave men to absolutely or conditionally pardoned ones. The existence of government control over the former in a way reassured the masters of their employee's subordination and discipline. With the summary jurisdiction hanging over the ticket holders and with the fear that 'the least instance of drunkenness or other impropriety' was likely to deprive them of this 'privilege' they were men more easy to handle anyway¹³³. The ticket of

130. By the regulations of June 1811, when a minimum of 3 years or half the sentence was imposed as a prerequisite for ticket eligibility. Bigge report, op.cit., pp.120-131.

131. Quoted by Shaw, op.cit., p.84.

132. Report of the Select Comm. on Secondary Punishments, loc.cit. p.547

133. Ibid. See also Roebuck's evidence to the Royal Comm. on Penal Servitude, 1863, P.P. Vol.XXI, col.1033-4.

leave exercised upon his owner 'a wholesome restraint' and kept him in the 'right way', which, however, contemporary observers were quick to differentiate from 'moral reformation',¹³⁴, although some believed that good and orderly behaviour made ticket of leave holders 'the best men in the colony',¹³⁵.

Some Other Aspects of the Ticket of Leave

In this chapter the focus of our interest has constantly been upon New South Wales, since this place became the first settlement after the resumption of transportation where ticket of leave as a measure of both penal practice and colonial policy originated. If we had to delineate the exact dates of our interest we might say that some years before 1787 and the years up to the cessation of transportation there in 1840 constitute the chronological framework of our analysis. Yet our specific interest evolves around the socio-economic and political conditions in the mother country which led to transportation, and naturally around the initial stage of colonisation of N.S.W. and the specific context within which ticket of leave and other similar measures came into existence. Although out of the central focus of our analysis it is of some interest to refer briefly to the development of ticket of leave in New South Wales. One may discern three distinct periods in relation to the conditions under which tickets of leave were granted: a) the period 1790-1811 which was an era

134. Evidence by Murdoch before the Select Comm. on Transportation, 1838, loc. cit., col. 1555, 1558, 1559.

135. Ibid. Commissioner Bigge characterised ticket of leave as 'an excellent instrument of the reformation of convicts, from the combined effect that it produces in stimulating their industry, and of restraining their misconduct'. Bigge's Report, loc. cit., p.673.

of unlimited discretion, b) the period 1811-1832 when a relative flexibility prevailed and c) the period 1832-1840 during which legal minima and further restrictions were imposed.

The first period, during which the foundations of Australia were laid, was characterised by a peculiar arrangement of the socio-economic organisation of the new colony, where convict labour constituted the most valuable commodity and where the convict was primarily seen as a labourer and not as an offender. The nature of the crime for which the convicts had been transported and the amount of punishment they had still to serve vanished before the specific demands of the new settlement and therefore what was relevant under the circumstances was not what they had done in Britain, but what they were able to do for the colony in the future. As no information was available about them in the first years of transportation, upon their arrival at New South Wales they were 'all treated alike',¹³⁶. It was a disregard with their criminal past which allowed some convicts to get tickets of leave, immediately after disembarkation. As a result persons in a 'higher situation in life',¹³⁷ or other persons unable to find active employment or unfit for manual labour, like goldsmiths, were given the indulgence, whereas those considered useful for government work, like mechanics, were not, notwithstanding their criminal antecedents. Apart from the feelings of grievance and injustice which such practice created among those who had not benefited from it, the total indifference to

136. See Bligh's evidence to the Sel. Com. on Transport, 1812, op.cit., p.33.

137. Ibid., p.11.

punitive considerations in the process of the enforced division of labour destroyed in the minds of the convicts 'the salutary feeling that they were doomed to eat the bitter fruits of bondage as a satisfaction to the injured laws of their country' and produced the belief that 'opulence can redeem the consequences of crime',¹³⁸.

The Governor had absolute discretion to grant or deny tickets of leave, but as early as 1812 the Select Committee on Transportation suggested that they would wish to see the power of the Governor more 'sparingly and cautiously made use of',¹³⁹. The absolute discretion of the Governor to grant tickets of leave went hand in hand with his absolute discretion to revoke them upon his pleasure, either for misconduct or because the government needed the holder's labour or skills¹⁴⁰.

During this period the liberating element of this mode of early release on licence was important, because it was the fact of early release which constituted the motive force behind the start of the system and its main *raison-d'etre*. On the other hand the conditional element of the ticket of leave, although not insignificant in itself, was undeveloped. Tickets of leave were given for a particular district for purposes of both facilitation of discipline and control and dispersion of the convicts to the various districts in an effort to prevent their accumulation into Sydney and other towns and assist the even development of the

138. Busby, *Observations and Suggestions Relative to the Present and Future Treatment of Convicts in N.S.W.*, Rep. of the S.C. on Second Punishments, 1812, App. No. 1, p.127.

139. Op.cit., p.13.

140. Governor Bligh for one reported that he could not 'recollect any case of his revoking any licence' evid. to the S.C. on Transp., 1812, p.32.

whole colony¹⁴¹. It is characteristic that a certain blacksmith was given a ticket of leave for a particular district for the purpose of establishing himself there where there was a great demand for this particular job. Thus many of the settlers were helped although living at a distance of more than twelve miles¹⁴².

Macquarie established a reputation as the most liberal governor in regard to tickets of leave and other remissions and became the target of various criticisms and an investigation by a Commissioner, but it was he who first established some specific minima of eligibility and thus introduced a new era in the development of the ticket of leave system. During this second period tickets of leave were still given under the rules of the Governors, but for the first time some regular limitations were set in the exercise of this power. Thus in 1811 it was declared that ticket of leave eligibility did not begin until the applicant had served at least three years for the government or a settler and only if his good conduct during this time was certified by the magistrate or clergyman of the district of his residence. It was further ruled in 1813 that applications were to be made once a year, and that the magistrates or clergymen should sign the form only if well acquainted with the person and only if they found him 'sober, honest and industrious'. In 1819 the minimum of service for the government was raised to four years at the end of which the convict was 'entitled' to the indulgence if he had behaved 'honestly, soberly and diligently'. Some years

141. Sel. Com. on Transp. 1812, p.12., Bigge's Report, op.cit., passim, Busby, Observations and Suggestions..., loc.cit., p.143, S.C. on Transp. 1832, p.28.

142. Bigge's Report, op.cit., p.51.

later, in 1827, new rules made grants of ticket of leave more difficult and rearranged various minima to provide for greater severity and wider flexibility. Thus it was decreed that those sentenced for 7, 14 years or life would be eligible after 4, 6 or 8 years respectively, but only if they had served one master. Longer minima were demanded if the applicant had changed two or three masters, without of course the master's fault. On the other hand, shorter minima were provided in cases of 'extraordinary service' to the government or the master, so that if he apprehended two runaways or a bushranger or a felon or a robber of his master his sentence was reduced by six months; if he brought to trial a receiver of stolen property he gained a reduction of one year; if two receivers, he gained two years; and if three receivers of stolen property, he qualified for a ticket of leave immediately. In such cases not only was the term before eligibility shortened or eliminated, but also the ticket holder was allowed to reside in more than one district. More generally it was ruled that holding of a ticket of leave for six years made one eligible for a conditional pardon¹⁴³. It is characteristic that shorter minima applied to women: 2, 3 or 4 years of service out of sentences of 7, 14 and life respectively. Even shorter periods were established for husbands and parents upon the arrival of their wives and families¹⁴⁴.

During the second period the conditions of ticket of leave became stricter. It was declared that all holders of tickets

143. See Regulations Respecting Tickets of Leave (in force 1/11/1831), appended to the Report of the S.C. on Transp., 1837, App. No.1, pp.64-69.

144. Ibid.

ought to be mustered once a month in a specific place by the magistrate of their district and that if they failed to report they had their tickets revoked. Furthermore, to their duty of attending divine service on Sundays, Good Friday and Christmas were added, while the superintendent had to muster them before and after their proceeding to the church and report the absentees the next morning. Finally, any movement outside the specific district was allowed only under a 'pass', only for no more than 2 weeks, and only for specified districts and reasons.

The third period starts in 1832, when a short Act 'for the Abolition of Death in some cases of larcenies and its substitution by Transportation' established for the first time legal minima and further restricted the conditions of tickets¹⁴⁵. In fact, this was the act in which ticket of leave was firstly called under this name in a statute. The Act legalised the minima referred to above, but diminished the relative flexibility of the previous period by abolishing any exception whatsoever. Three years later, not under the provisions of the said act, the Governor declared that the minima might be lengthened for every change of master, due to the applicant's misconduct, or for any sentence imposed by the colonial courts. At the same time the practice of muster by the police magistrate (quarterly outside the town of Sydney and the country and monthly in the town of Sydney) was maintained and it was further provided that the ticket holders had to report to the wardsman of the parish in which they were going to reside, as well as to the wardsmen of both parishes in case of moving from one parish to another. Any neglect of these obligations led to

145. The Act 2 & 3 Will. 4, c.62.

the cancellation of the ticket. The ticket was also cancelled when their holders moved outside their specified district without a 'pass',¹⁴⁶.

One might say that the conditional element of the ticket of leave which was in embryo during the first period and developed during the second, now tended to dominate the whole practice, as the liberating element shrank more and more. In the same way and without losing altogether sight of a colonial interest it became gradually a measure of penal practice in the sense that the ticket holders were increasingly seen as convicted offenders and not primarily as a standing army of cheap labour. The development of the ticket of leave reflected a similar development of New South Wales from a primitive penal settlement to a developing colony and then to a prosperous and more or less independent society. Also it expressed the growing concern with the fate of secondary punishments in the mother country, which pushed towards greater severity in transportation and more deterrent measures in dealing with the criminal class. Early in 1819 the Colonial Secretary emphasised that since the colonies were originally envisaged as 'receptacles of criminals' the administrators had the duty to render transportation 'an object of serious apprehension' and an 'object of real terror',¹⁴⁷. The Select Committee on Secondary Punishments saw transportation as an 'inadequate punishment',¹⁴⁸, while in the 1830s strenuous efforts

146. See Ticket of Leave Regulations as consolidated in May 1835 reproduced in the Report of the S.C. on Transp., P.P., 1837-38, v.XXII, App.C, no.41, pp.236ff.

147. Bathurst in his Instructions to Commissioner Bigge, HRA,X,pp.4ff.

148. They characterised it as 'an advantage rather than a punishment' and wanted to see it 'clothed with sufficient terrors to deter from the commission of crime', Report, 1832, op.cit., p.19-20.

were made to tighten up the whole system still further¹⁴⁹. One year after the act of 1832 which set the legal minima the Governor of New South Wales was ordered to exercise an 'increased rigour',¹⁵⁰ as his predecessor had been instructed from the Colonial Office to revive among the criminal classes that 'dread of transportation' whose absence was so disturbing¹⁵¹.

The organisation of ticket of leave decision making process, with a 3-stage system, is worth mentioning. The first stage consisted of a Board or Bench of no less than three magistrates who collected all the applications of interested persons, checked the particulars, and investigated through the police previous convictions if any. They could reject an application when the candidate was found an offender during the period of eligibility. Otherwise they forwarded the applications to the Principal Superintendent of Convicts who, after careful study of every case, made his own recommendations and then submitted the applications to the Governor for the final decision. The absolute discretion of the Governor to grant or deny the indulgence was beyond question. Right of appeal was non-existent. If a ticket of leave was not finally granted both the master of the convict and the Bench were informed.

As we have seen the ticket holder was not absolved from guilt and remained a convict until emancipation or absolute pardon. It was traditionally accepted that the man under ticket of leave could earn wages and retain property, although under common law he, as

149. See Shaw, op.cit., pp.184-216, 266-294.

150. Stanley to Bourke, 21 Aug., 1833.

151. Bathurst to Darling, 24 Sept., 1826.

convict, was subject to attaint and unable to acquire property or to maintain a suit in a Court of Justice. A Colonial Act¹⁵² of 1832 declared, however, that coming to the colony was a prima facie evidence of the person's being a convict, and at the same time extended the protection of the law to convicts under partial remission, to the effect that it recognised that they were able to maintain any action or suit in a court for the recovery of any property and for any damage or injury sustained by such felon since his remission. Paradoxically, the act was at variance, if not contrary, with the express terms of the 2 & 3 Will. 4 C.62 of the same year, which did not allow ticket of leave holders to acquire property or maintain suits in the courts previously to pardon, with the consequence that though the ticket holder was permitted to work on his own account, he could not recover wages for work so done or call in his debts, and thus was liable to be defrauded and exploited.

This 'legal absurdity' of course pointed to the pragmatic basis of the colonial legislation and its attempt to satisfy real socio-economic needs, when the imperial rule constituted simply an empty legalistic schema. As Governor Bourke observed:

'it is difficult to conceive the object of remitting the servitude of an offender and throwing him upon his own resources if at the same time he is kept subject to a disability which deprives him of any certainty of obtaining the fruits of his labour'¹⁵³

On the other hand, since some ticket holders worked as constables under salary and therefore were taxed, the contrdictory situation was formed in which a part of property was taken away from those

152.The Act 3 Will. 4 No.3.

153. Bourke to Goderich, 21 Nov., 1832, reprinted in Sel.Com. on Transp., 1837, App. no.1, pp.62-63.

who were legally pronounced incapable of acquiring or retaining any property.

This was not the only area in which a divergence existed between imperial legal enactments and actual practice in the colony. It is of interest to note here that ticket of leave itself was legally recognised after more than three decades of operation in the colony by the Act 9 Geo. 4 c.83 (1828) which provided that it was lawful for the Governor

'to grant to any offender or offenders transported to the said colonies such temporary or partial remissions of their sentences as to such Governors may seem best adapted for the Reformation of such offenders, and such temporary or partial Remissions from time to time to revoke and renew as occasion may require...'¹⁵⁴

The same Act gave the Governor power to revoke assignments, which were firstly legalised in 1824¹⁵⁵.

If New South Wales began as a colony of England, Van Diemen's Land began as a colony to the colony, on which it depended practically and administratively^{155a}. From the beginning of its establishment in 1803 and later on, when it received transportees directly from England (1818-1853) Van Diemen's Land (Tasmania) was intended for those with worse records or guilty of more serious crimes. It must be admitted that although the system of penal and colonial administration were basically the same in both islands, Van Diemen's Land was ruled in a more severe and autocratic way, perhaps because of the character of its convict population and the smallness of the

154. Statutes at Large, Vol.11.

155. By the Act 5 Geo. IV c.84. The same Act invested the Governor with the 'property in the services of the offender'.

155a. For a history of Van Diemen's Land see J. West, History of Tasmania, Launceston, 1852.

island which helped better policing and discipline. Particularly under Governor Arthur (1824-1836) the island was governed as if it constituted a penal institution for convicts and settlers alike^{155b}. Tickets of leave were granted there mainly as rewards for good conduct after exemplary service of the legal minima and under strict enforcement of the rules. As for the so-called 'penal settlements' like Norfolk Island, Macquarie Harbour and Port Arthur, which were kept for the most serious criminals and for the re-transportation of transported convicts, where convicts committed murders in order to be relieved from their sufferings or to risk an escape when on trial in Sydney or Hobart Town, it seems that the less we say about them the better..... since, after all, tickets of leave were never allowed in these settlements^{155c}.

155b. See W. Douglas Forsyth, Governor Arthur's Convict System, London, 1935; Grünhut, op.cit., pp.76-77, G. Ives, History of Penal Methods, London, 1914 and Arthur's Reports on the State of the Colony included in various Parliamentary Papers.

155c. It was admitted that these penal settlements proved 'that transportation is capable of being carried to an extent of suffering such as to make death desirable'. Forbes (Chief Justice of Australia) in a letter to Amos, quoted by the S.C. on Transp., 1837-38, p.xv. See also his evidence to the same Committee, no. 1331-74.

Conclusion

Ticket of leave then constituted a form of early release on licence which developed out of the particular state of the productive forces in Australia at the specific and historically determinate junction of the early years of this penal and colonial settlement, when a constant scarcity of labour, a permanent need for economy and self-sufficiency on the part of the government, and an underlying dilemma regarding the real nature of the settlement (receptacle of criminals or a stage in colonial development) were the dynamic forces that formed and shaped the social life and the institutions of the new country. Ticket of leave emerged as a method of remission which allowed a surplus convict population to dispense with forced labour at government employment and find suitable occupation within a particular district. Thus it reduced government expenditure without thwarting the economic development of the colony as it only transformed penal servitude to a semi-free type of labour. Furthermore, when and to the extent that ticket of leave was granted as an incentive or reward for good conduct and industry it operated as a powerful factor of conformity, discipline and orderly behaviour.

Postscript

Before closing this chapter we shall refer to an interesting point of juxtaposition of the general conditions in Britain and Australia, in order to examine from a different angle the question why the ticket of leave originated in Australia, although the conditions in the mother country after the introduction of the hulks were favourable for a type of conditional release, if only to relieve the gaols and the hulks from their superfluous population. We have already suggested¹⁵⁶ that for a new system of punishment to be introduced society must be in a position to incorporate it; but the analysis of the British context made above showed that the social and penal situation in the metropolis at that time was not favourable to a system of early release like ticket of leave. In an era when the criminal law was based on terror and the prevailing mentality demanded elimination of a part of the criminal population as large as possible through transportation 'beyond the seas' for a period of time as long as possible, any release of serious criminals in the community had been considered as a negation of this situation

156. In our theoretical discussion, Chapter 2 above

and, therefore, unacceptable¹⁵⁷. A petition to the King from the City of London in 1786 for 'a speedy and due execution of the law both as to capital punishment and as to transportation' was characteristic of the prevailing mood¹⁵⁸. On the other hand, the hulks were never considered as permanent institutions, and alternatives were sought for from the first moment¹⁵⁹. As a matter of fact, from 1784 onwards a sentence to the hulks, until then being given in lieu of transportation, was now regarded as part of the sentence of transportation supposedly due to start very soon¹⁶⁰. Legally, convicts on the hulks were supposed to be on their way to America and Duncan Campbell in that year had contracted to carry 260 felons to America, although it was well understood that this contract could not be executed and was made solely to clear the gaols. To be sure, there used to be some early releases in the form of pardon even then. Yet, most of these pardons were given 'on condition of going into the Army or Navy', a fact which Colquhoun considered as resulting from 'motives of humanity'¹⁶¹. The famous 'press-gangs' and the notorious military discipline, especially in the Navy, had nothing humane to talk about¹⁶². In any case even these pardons were taking the criminals far

157. It must be remembered that return from America of transported convicts had been for long considered a felony punishable by death.

158. Quoted in O'Brien, op.cit., p.178

159. The Act 16 Geo III c.43 authorised hulks for 2 years only! For the continued interest in transportation and the governmental efforts at finding suitable places as receptacles of criminals in various parts of the globe (Gambia, Caffre Coast etc.) see Shaw, op.cit., pp38ff.

160. See the Act 24 Geo III c.56, which made the hulks a preliminary stage to transportation.

161. Colquhoun, Police of the Metropolis, London, 1800, p.450

away and out of sight. It was exactly this 'out-of-sightness' which made ticket of leave undesirable in Britain¹⁶³.

On the contrary, the soil of Australia was more favourable for the various remissions to take roots. This related to the socio-economic conditions in the colony as a dependent entity out of which the various instruments of colonial policy - like assignment, land grants, remissions etc. - developed as inevitable consequences of the specific nature of her productive and social relations. In other words it reflected the peculiar relation of instrumentality and subordination of the colony to the penal, colonial and other goals of the mother country. Transportation ideally combined a colonial objective with deliverance of the mother country from her undesirable and unwanted elements whom it transferred eleven thousand miles and eight months away, to an unknown, uninhabited and largely unexplored island¹⁶⁴. As long as the convicts embarked and every obstacle was imposed on their way back their fate was of no immediate interest to Britain, since whatever happened in the colony was too far away to jeopardise her security or social order¹⁶⁵. Not only did early release on licence in Australia not prejudice the British social order; it was also compatible with the broader goals of the British state for

162. Furthermore, as Dr. Johnson had observed 'being in a ship is being in jail, with the chance of being drowned'. In 1799 taking convicts as soldiers was prohibited.

163. J. Bentham captured this mentality well when he put in the mouth of a judge this parody of a sentence: 'I sentence you, but to what I know not; perhaps to storm and shipwreck, perhaps to infectious disorders, perhaps to famine, perhaps to be massacred by savages, perhaps to be devoured by wild beasts. Away - take your chance; perish or prosper, suffer or enjoy; I rid myself of the sight of you'. Bentham, Penal Law, Book V, ch.2, Works, i, pp.490ff.

imperial advancement and economic development. As the colonial character of the settlement became clearer after some immigration of free settlers and the demand for labour continued strong early release on licence was welcomed by the population at large and the administration of the colony as a means of supplying the colony with cheap labour power. It is of major significance to underline here that slave trade had never been carried out to Australia although it still prospered in various other parts of the world, and this was due not to the increasing opposition launched against it, but to the over 160,000 convicts who had been dumped through the years on the inhospitable shores of Australia as a standing army of labour ready to be employed for state and private interest, under conditions and forms not so radically different from contemporary slavery.

It was with great reluctance that the British state conceded to the discontinuance of transportation when it 'ceased to pay' due to an oversupplied labour market in the colony. But while transportation to New South Wales stopped in 1840 and in Van Diemen's Land in 1852, it was in 1867 that

164. Australia has been characterised as 'the largest penitentiary the world had ever seen', a statement which, although ignores the colonial purpose, graphically illustrates the relation of instrumentality of the colony to the mother country in the penal respect.

165. From the early years of 'colonisation' Phillip was instructed that although prohibition of return of ex-convicts could not be legal, 'it should be distinctly understood that no steps are likely to be taken by Government for facilitating their return', Grenville to Phillip, 19 Feb. 1791.

the last convict ship sailed to Western Australia¹⁶⁶. Then it was high time for Britain to grapple with her crime problem and deal with her convicts within her own community. The days were over when she could solve her social problems 'by extirpating the inhabitants'¹⁶⁷.

166. For the late history of transportation, see Shaw, op.cit. (passim).

167. From the famous aphorism of G.B. Shaw, in the Preface to S. & B. Webb, op.cit.

Chapter 4

THE IRISH CONVICT SYSTEM (1856-1866)

Introduction

In the following chapter we shall examine in some detail the operation of the Irish Convict System. This system was founded, as the English system, on the Penal Servitude Acts of 1853 and 1857, but it differed from the latter so fundamentally in matters of actual practice that a separate examination and analysis of it is long overdue. The Irish system was considered at its time as a 'model' system of prison discipline, gained favourable comments from many penal thinkers here and on the Continent, and found strong supporters and greatly influenced the thought of a large number of penal reformers on the other side of the Atlantic¹. Famous names in the penal history, like Mary Carpenter and Matthew D. Hill in England and E. Wines, Sanborn, Brockway, Hubbell and T.W. Dwight in America, generally considered it as an indisputable success and as the best method men ever used in dealing with the problem of criminals. We shall give ample evidence of the prevailing enthusiasm about the 'Irish system' in the proper section in this chapter. Suffice it here to present only M.D. Hill's assessment that:

Thus, then, in my humble judgement, the Board of Directors of the Irish convict prisons have practically solved the problem which has so long perplexed our Government and our Legislature - what shall we do with our convicts?²

The comments were particularly favourable when the system was

1. As we shall see in the next chapter.

2. In a paper at the First Meeting of the Social Science Ass., Birmingham, 1857, quoted in M. Carpenter, Our Convicts, London, 1864, p.22 (all emphases in this chapter are mine unless otherwise stated). Th.R. Shore, Protestant Chaplain at Mountjoy Prison repeated this remark of M.D. Hill in his report to the Directors of the Irish Convict Prisons, Seventh Annual Report, p.21 which is characteristic of the prevailing enthusiasm even between penal

compared with that of England, although both were based on the same legal basis, and suggestions were made from many quarters for the introduction of the system in this country or at least the exploitation of the Irish experience for the improvement of the English system, with special emphasis on the last stage of the Irish experiment, that is the strict enforcement of the law regarding the conditions of release on licence and the close supervision of the prisoner after his release. It was mainly because the Irish system was more severe and repressive that its supporters asked for its general appliance. One of its opponents, Joshua Jebb, Director of the English Convict Prisons, made strenuous efforts to demonstrate that in matters of recidivism, his system was equally successful without being so severe; nevertheless, he painstakingly attempted to show that the honour given to Ireland was due to England because it was she who initiated this system of prison discipline many years before; thus trying both to defend his own system and to appropriate the encomia made for the other³. Many years later another English Director, Ruggles-Brise, repeated that the attribution of English ideas to Irish origin 'betrays a curious ignorance of the English system', going again to lengthy accounts of historical origins⁴. We are not going

administrators. See also M. Carpenter, op.cit., p.81 'a great social problem has been solved in the Irish Convict System'.

3. In his memorandum included in the Reports of the Directors of Convict Prisons for the Year 1860, London, 1861, he called the Irish Convict system 'only a copy' of the English system 'with those additions from the colonial system which were considered suited for Ireland', op.cit., p.li.

4. E. Ruggles-Brise, The English Prison System, London, 1921, p.29.

here to follow them in their chauvinistic, rather than scientific, endeavours, since our conceptualisation of historical specificity precludes a unilinear development of historical progress. The most important question for our purposes is not which system preceded which, but, given that the two systems were essentially different, although operating in the same legal framework, why did they differ? Which forces, social, economic or political, generated, or fostered, or made possible those elements of the Irish system that were giving it its distinctive character: like the intermediate prisons, the ticket of leave, the supervision by the police, the appointment of an official to supervise and help the ticket holders? Which were the aims of the system at the administrative level, and how were they related to the wider context of social and economic conditions? As we have repeatedly emphasised and as we have already amply demonstrated in the previous chapter, penal measures do not operate in a vacuum, but are part of the broader social, economic and political context, and only by examining and analysing this context can we attain a clearer understanding and a deeper knowledge of the nature of specific penal control systems and their function in society.

In this chapter we shall describe and analyse the Irish experience of early release on licence at the beginning of the second half of the nineteenth century, within the context of the famous Irish Convict system, as well as within the context of the economic and socio-political relationships prevailing at the time; relationships which were overdetermined

by the specific juncture of Ireland's colonial situation. We shall attempt then, first, to briefly outline the form and content of Anglo-Irish relations, as they were formulated through the centuries and, in their turn, penetrated and permeated every-day life, social organisation and social relations in that island, and afterwards we shall proceed to an examination of the penal system and early release on licence.

Ireland and Colonialism

Ireland has been one of the first victims of English imperialism and colonialism⁵. Conquered in the twelfth century by Norman princes and settled and reconquered in the seventeenth century by the Tudors, Ireland was never totally subdued and anglicised, like Scotland or Wales. Domination and coercion on the part of the coloniser and constant resistance and rebellion on the part of the colonised have characterised Anglo-Irish relations from the beginning. The Act of Union of 1800, which succeeded the Irish rebellion of 1798, brought the political incorporation of the two countries, but never achieved Ireland's integration in the British Society; it only changed England's external colonialism over Ireland to internal, where the latter became a peripheral region of the so-called 'United Kingdom'.

5. For the following outline of the Irish history we have been based on E. Strauss, Irish Nationalism and British Democracy, London, 1951; N. Mansergh, The Irish Question 1840-1921, London 1965; G. Broëker, Rural Disorder and Police Reform in Ireland 1812-1836, London, 1970; M. Hechter, Internal Colonialism, London, 1975; H. Idzikowski, Internal Colonialism and the Emergence of the Irish Police, M. Phil. thesis, Edin. Univ., 1977; P.O'Farrell, England and Ireland Since 1800, O.U.P., 1975; Marx & Engels, On Colonialism, Moscow, 1968 and others.

As we have suggested elsewhere⁶, colonial domination is total domination. It is based on sheer repression of the subordinate people, through naked coercion, forced assimilation and forced acculturation to the values of the dominant group. Yet, since colonial domination cannot be effective for long without a degree of tolerance or acceptance by the conquered people, it develops a specific ideology in order to legitimate colonial power and oppression; an ideology which projects the superiority of the dominant, and the inferiority of the subordinate to the level of savage or animal. By denigration and contempt, together with repressive measures at forced assimilation, colonial domination tries to undermine the indigenous will to resist and, therefore, facilitates colonial control.

Ireland illustrates almost ideally the cases of external or internal colonialism; in fact she constituted one of the first colonial experiences of England, whom she helped 'to evaluate later colonial policies'⁷. Repressive and ideological efforts at 'anglicisation' intensified during and after the seventeenth century. The plantation of Londonderry in 1608 and the subsequent influx of English and Scottish Lowlanders in other settlements meant that the Irish had to draw out of their land and into the woods. When Cromwell conquered Ireland in 1649, he confiscated the land and distributed it to Protestant, non-Irish colonists, so that by 1688 nearly 80% of Irish land was in the hands of Englishmen and Scottish

6. Chapter 2 above, where further references on external and internal colonialism.

7. Hechter, op.cit., p.73.

Protestants⁸. Not only were the Irish driven out of their lands; unending efforts were made by the colonizers to root out the Gaelic language and the practice of Roman Catholicism. The criminal law, as a direct instrument of colonial and class interests, was widely utilised against the indigenous Catholic population by the English State in order to preserve the status quo and sustain English domination in the economic, political and ideological spheres. The famous Penal Laws, which were in force for more than one hundred years, until the Catholic Emancipation of 1829, entailed that Catholics were prohibited from being members of Parliament, bearing arms, owning horses of certain value, being apprentices at gunsmiths, being educated abroad, keeping a public school, receiving degrees, fellowships, scholarships, becoming Bishops, lawyers and other such professions of high standing and, most importantly, they were not allowed to vote. Therefore an alien minority was the law-making and law-enforcing agency, it manned the administration of the colony, filled the professions of high status and implemented colonial hegemony everywhere.

The political powerlessness, dependence and subordination of the Irish was complemented by an ideological 'apology' which attempted to reduce the Irish into the status of barbaric savages and jungle animals, in need of subordination and coercion by a 'superior' power able to bring them, if possible,

8. The Land question, one of the most perplexed Irish problem, was not seriously approached before the 1870s. This question was in the core of Irish unrest and the fountain of most grievances. No security of tenure, extortion of unbearable rates and no property over the improvements effected by the tenants were the most strongly felt injustices by the Irish peasants. For a recent analysis of the whole problem, see E.D. Steele, Irish Land and British Politics, Cambridge, 1974.

into the orbit of civilisation. Although differences in colour did not exist between Anglo-Saxons and Celts, racism was, nevertheless, at the basis of this 'apology'. An historian from Cambridge visited Ireland in the last century and described how he was 'haunted by the human chimpanzees' he saw along that hundred miles of 'horrible country'⁹. Another commented during his 1841 tour of Ireland that 'the inhabitants, except where they had been taken in hand and metamorphised into police, seemed more like tribes of squalid apes than human beings'¹⁰. These stereotypical images were a result of fear and hatred. Lord Liverpool considered that the Irishment were 'not influenced by the same feelings as appeared to affect mankind in other countries'¹¹, while Queen Victoria characterised them, 'really shocking, abominable people - not like any other civilised nations'¹². This superimposed discriminatory 'differentiation', 'moral inferiority' and 'political incapacity' of the Irish people¹³ provided the English with both an excuse and a justification for the continuation of colonial domination and oppression.

The colonial situation of Ireland became the context of her domination and ruthless exploitation. The minority of

9. Quoted by Curtis, Anglo-Saxons and Celts, N. York, 1968

10. Quoted by Farrell, op.cit., p.69.

11. Ibid, p. 49.

12. Ibid.

13. This ideology was shared by the prison administrators as well. The Protestant chaplain in Smithfield wrote about them: 'with all their natural intelligence and acuteness, the Irish are in general but children of larger growth'. Th.Shore, in Fifth Annual Report, p.139, while the Directors of the Convict Prisons in their first ever Report reported that 'coercion appears to be the only force they are capable of appreciating', First Annual Report, p.4.

landowners, most of them absentees, and the system of land tenure prevailing there, resulted in the accumulation and export of capital by the protestant ascendancy, while the overwhelming majority of the Irish people rotted in abject poverty. Ireland's economy remained agricultural, instrumental for the colonial economy and subservient to it. The lack of industries - outside Ulster - meant that no industrial middle class was created in Ireland, so that the country lived in a semi-feudal condition, when across the channel Britain was the 'workshop of the world'. Numerous visitors to Ireland were shocked by the degree of poverty prevailing in Irish economic and social life. Cavour, observed that Ireland presented 'the saddest spectacle to be found in any civilised society; complete and absolute oppression of the poor by the rich, of him who labours by him who possesses, organised by the law and maintained by the ministers of justice',¹⁴.

Beaumont described how the country was inhabited by a small aristocracy living in great luxury and the great majority of the people living in the lowest depth of poverty¹⁵.

In order to preserve and reproduce the existing colonial relations the English state used its repressive and ideological

14. Cavour, *Thoughts on Ireland*, London, 1868 (first appeared 1845), quoted in Mansergh, op.cit., p.90.

15. No visitor remained insensitive to the abject poverty of a whole nation. N. Senior described the Irish as 'a population more unhappy in itself, and the cause of more unhappiness to all who have to deal with it, than any other civilised and free community in existence'. W. Scott found the Irish 'on the extreme verge on human misery; their cottages would scarcely serve for pig-styes even in Scotland'. The economist Ricardo saw Ireland 'an oppressed country - not oppressed by England, but by the aristocracy which rules with a rod of iron within it'. For these and other references see N. Mansergh, op.cit., Ch.1, pp.39-75.

mechanisms, in addition to Dublin Castle which constituted the administrative and executive branch of English rule at the local level¹⁶. Repression was secured through a standing army directly responsible to the English government, and by other law enforcement bodies like militia units and yeomanry corps. The growing resistance of the Irish people and their rejection of alien authority led to an intensification of repression, especially at the period between Waterloo and the Famine, which has been called 'a true Thirty Years War for the Irish people'¹⁷. During this period Catholic emancipation was finally achieved, but on the other hand agrarian unrest and civil disturbances led to the formation of Irish Constabulary.

. As a recent historian of Irish police argues:

The Irish Constabulary, as a centrally controlled force, directly responsible to, and working in close touch with the executive, proved to be the greatest value in promulgating and carrying out with the least possible delay the orders of the government. The Constabulary was to be the eyes and ears of the government¹⁸.

Robert Peel, who was the architect of the new police in Ireland, envisaged it as a 'civilising' agency, yet as the same historian observes 'in Ireland the police idea emerged out of a colonial system which aimed at bolstering and securing the mercantilist interests of England'¹⁹. The Irish Constabulary has been characterised as 'an army of occupation with police functions'²⁰, whose loyalty was famous and their efficiency in defeating the Fenian rising added to their title the word 'Royal'. An

16. For the way Ireland was governed see R.B. McDowell, The Irish Administration 1801-1914, London, 1964

17. E. Strauss, op.cit., p.79.

18. H. Idzikowski, op.cit., p.111.

19. Ibid, p.83.

anonymous Englishman touring Ireland in 1867 was delighted with their appearance and skill, as well as by their 'fidelity to the Crown' which he described as 'wonderful'. Their military display, in the country for deterrent purposes were part of the Irish everyday life, and their presence ubiquitous and notable, as the same observed²¹.

However, neither brutal force, nor 'safe' reforms and conciliation (like poor laws, settlement of the tithe question, reforms of the Irish established Church etc.) reduced or extinguished Irish resistance, rioting, unrest, guerilla warfare and other primitive forms of revolution. To the oppression of the colonists, the Irish answered by total disrespect for English law and order. Feeling alone and unprotected they developed various agrarian and religious secret societies designed to enforce peasant-made law over the law of the state²². These societies formed the 'standing army of the disaffected'²³ and 'a crude form of politics by which the will of the community was enforced and evils ignored by the legislature redressed'²⁴. 'Crime' as a form of rebellion against the oppressive situation was rampant; for the Irish it was a legitimate weapon in defiance of an alien authority, hence their sympathy and wholehearted support for the 'criminals'²⁵.

20. Strauss, op.cit., p.99

21. An Englishman, A Walking Tour Round Ireland in 1865, London, 1867, p. 326.

22. For these societies and their aims see G. Broëker, op.cit. The things were complicated as the Protestants had their own secret societies which were, however, highly tolerated, if not openly supported by the officials.

23. Broëker, op.cit., p.8

24. McDowell, Public Opinion and Government Policy in Ireland, London, 1952, p.59.

The political content of violent crime in Ireland has been admitted by a contemporary writer, and an agent of a landowner at that:

We can scarcely shut our eyes to the fact that the circumstances and feelings which have led to the terrible crime of murder in Ireland are usually very different from those which have led to murder elsewhere. The reader of the English newspaper is shocked at the list of children murdered by professional assassins, of wives murdered by their husbands, of men murdered for their gold. In Ireland that dreadful crime may almost invariably be traced to a wild feeling of revenge for the national wrongs, to which so many of her sons believe that she has been subjected for centuries²⁶.

It is within this context of colonial relations that the penal system of Ireland should be understood. Penal control intervention as a whole in that country aimed primarily at the suppression of the subordinate population and the maintenance of colonial domination, not only through sheer repressive control, but also through ideological manipulation, forced or concealed acculturation and a degree of conciliatory social reform. A strong standing army, not even susceptible to the Mutiny Act, and a well organised and centralised police force, both of which were absent from the English society, represented the undisputable symbols and instruments of colonial power and superordination, and aimed at the suppression of Irish resistance and the imposition of domestic tranquillity.

25. N. Senior observed in relation to this: 'In the one, public sympathy is with the law, in the other it is with those that break it. In England crime is infamous; in Ireland it is popular.' Quoted by Mansergh, op.cit., Engels wrote that 'the attempts of the Irish to save themselves from their present ruin... take the form of crimes', The Condition of the Working Class in England, 1973, p.310. This work includes some of the best and most vivid descriptions of the plight of the Irish immigrants in the English towns.

26. W.S. Trench, Realities of Irish Life, London, 1868, p.361

The same objectives underlined the assumption and the actual practice of the Irish Convict system as well. The creation of 'good' and 'obedient' citizens out of rebellious and resistant Irish was of paramount importance for the administration, yet it had to be operationalised within a fully repressive context.

The repressive and ideological function of the colonial penal system in Ireland - suppression of the subject people and inculcation of lawful obedience and good order - was supplemented by the specific requirements of nineteenth century Britain²⁷. Ireland, assigned by British colonial policy to the role of agricultural producer, never achieved a moderate degree of industrialisation outside Protestant Ulster; her population remained peasant. As the contingencies of the 1840s and 1850s in the Irish scene resulted to an influx of Irish immigrants to the industrial cities of England and Scotland the image of the Irish as totally unqualified for industrial work came to parallel that of 'violent terrorists'. The way of life and mode of behaviour of the Irish proved to the English beyond doubt that these wretched creatures who swelled the slums of industrial towns lacked those attributes which made England the first world power: work, thrift, forethought, sobriety and industry²⁸. Their poverty, recklessness,

27. This is to emphasise the relationship of instrumentality and dependence of Ireland's economy because of its colonial status and not to exclude partial utilisation of the potential advantages of the Irish convict system by the dependent section itself. The Manager of Scottish prisons observed in relation to Ireland that 'the prosperity of Ireland has lately demanded more trained and skilled labour than the condition of its population could afford, and hence the training of the convicts has been an immediate gain to the country', J.H. Burton, Report appended to the Twentyfourth Report on Prisons in Scotland, Edin., 1863, p.87.

28. The Irish are a nation 'utterly unfit for manufacture as now conducted', wrote Engels, op.cit., p.308.

drunkenness, untidiness, bohemianism, carelessness and their satisfaction in, and capacity for, manual work only, contrasted sharply with the discipline and acquiescence required by the industrial process of production. It was for the accomplishment of this purpose as well that the 'reformatory course' carried out in the Irish Convict system was implemented. The inculcation of habits of submission and subordination to the colonial regime went hand in hand with the teaching of various skills and the inculcation of habits of discipline, honesty and industry as the subordination of Ireland to colonial England coincided with her being the 'standing army' of labour for industrial England.

The Irish Convict System

When the Board of Directors of Convict Prisons for Ireland was appointed with Captain Crofton as Chairman in November 1854 the transportation of Irish Convicts to the colonies had already come to an end. Since the year 1853 no convicts had been sent away from Ireland, so that they had to be dealt with and absorbed in that country. This change of policy was immediately felt by the authorities, given that before the introduction of the Penal Servitude Act of 1853 almost all Irish convicts were sent to the colonies; from 1849 to 1853 as many as 5,300 convicts were disposed of in that way, despite the repeated protests of the Western Australians, who considered them as of 'a singular inaptitude to comprehend the nature of moral agencies or to be affected by them' and of such 'prostrate condition physically and morally' that they refused to accept them

any more, even as sources of cheap labour²⁹. The appointment of the Board of Directors must be seen as the result of the slight panic ensuing the cessation of transportation and the realisation that new ways of dealing with convicts in their own country had become inevitable³⁰.

The new system of prison discipline introduced in Ireland was a more systematic arrangement of previous methods of convict management, heavily indebted to the ideas and experiments of Alexander Maconochie in Norfolk Island and various contemporary practices in England, her colonies and the Continent itself³¹. The Irish system was original in the way in which it developed, improved and synthesised all these elements in a more or less sophisticated system of organisation based on simple principles, yet with great attention to details. Its essential characteristics included a progressive classification through a system of marks, the novelty of the intermediate prisons, conditional release on ticket of licence and strict supervision after release. It is of interest to note here that the ticket of leave had not been introduced from the start by the new authorities, because as they suggested:

29. See the First Annual Report of the Directors of Convict Prisons in Ireland, Dublin, 1855, p.4.

30. For the background of these developments, and the Irish Convict system in general see descriptions in the following contemporary works: M. Carpenter, op.cit., M. Carpenter, Reformatory Prison Discipline, London, 1872, G.B. Hubbell, Report on the Prisons of England and Ireland, in 22nd Annual Report, New York Prison Association, (N.Y.P.A.), 1867, Evidence given by Crofton and J. Organ to the Royal Commission of 1863, Parliam.Papers, Vol.21. Also some works by W. Crofton himself: A Few Remarks on the Convict System, Dublin, 1857, A Brief Description of the Irish Convict System, 1862 and Convict Systems and Transportation, London, 1863, Four Visiting Justices, Observations in the Treatment of Convicts in Ireland, London, 1862

We consider such a 'ticket of licence' to be a sort of guarantee to the community, that in consequence of a prisoner having been subjected to a proper course of prison discipline and reformatory treatment, he is considered a fit subject to be received and employed by those outside the prison... Such reformatory course not having hitherto been pursued in this country, we have not felt ourselves justified in recommending the issue of tickets of licence³².

Tickets of leave were granted first at the beginning of 1856, when the 'reformatory course' was well under way for some years. They were regarded as the last stage of this course, perhaps the most important, as they constituted the means of testing prisoner's fitness for liberty, as well as the efficacy of the new system of prison discipline. A convict was eligible for ticket of leave only after a continuous hard effort at perfection and self-improvement which was reflected in his passing from one prison stage to the other.

There were three stages of prison discipline in the Irish penal system. The first, or probationary stage, was a period of nine months in strict separate confinement. The period was extended or reduced according to the bad or good conduct of the prisoner. The diet was the lowest possible and no work was provided during the first three months of imprisonment. The chapel, the school and exercise were the only little distractions from the solitude. The second stage, which was more complex, included four classes in an upward classification from the third to the second, from that to the first and then to the

31. For A. Maconochie and his system, see generally J. Barry, Alexander Maconochie of Norfolk Island, Melbourne, 1958 and more recently St. White, Alexander Maconochie and the Development of Parole, J.Cr.L. and Crim., 1976, Vol. 67, pp.72-88, where further bibliography can be found.

32. First Annual Report, op.cit.,p.5.

advanced or 'exemplary' class. The promotion of the prisoners depended upon their own general conduct, measured by marks under three headings, discipline, school and industry. For each class a certain number of marks was required, the minimum period required for the passing of all these classes being twenty months or one hundred and eighty marks. Various privileges and rewards were allotted to the prisoners as they were going up in promotion, and two types of badges showed their prison status, as well as being signs of identification. In this second stage the prisoners were employed in fortifications and other public works, while those who were disabled and sick were employed in various trades of a lighter character. Those passing successfully the first two stages were forwarded to the third stage, that is the intermediate prisons, where conditions of greater freedom were possible almost approaching those of the outside world. No marks were given at this stage.

Those who by their good conduct were considered as suitable cases for release before the expiration of their sentences were granted 'tickets of leave' under several conditions. These conditions were enforced strictly and any irregularity, not necessarily criminal, resulted in revocation of the licence. During this last stage the police in the country, and an especially appointed official in Dublin applied a wholesome supervision and surveillance on the released convict. The surveillance included not only the ticket holders, but also those who were released from the convict prisons in the ordinary way after the expiration of their sentences. The prisoner's frequent reports to the police, his photograph and his

registration were employed as methods by which the authorities were put on the criminal's traces for, as we shall see, preventive reasons and easy apprehension.

This was, in a brief outline, the general framework within which a very 'promising' and very 'successful' system of penal practice was operating in Ireland. We shall see below, in a more detailed way, the aims and the purposes of the system and the assumptions behind them, at the administrative and social level, as well as the ideological grounds upon which those who conceived it and those charged with its smooth functioning based their philosophy and defended the existence and the particular structure of the Irish Convict system. The Annual Reports of the Directors of Convict Prisons in Ireland, which were published in Dublin from 1855 onwards, contain innumerable reports by local inspectors, governors, chaplains, head schoolmasters and so on, which constitute important documents of information on administrative matters, as well as mirrors of the ideas, opinions and general attitudes of these persons towards such issues as crime, punishment, prisons and other more general social problems. The view of the Irish system 'from above', from those enforcing and maintaining it, will illuminate the way in which the ruling class in Ireland were thinking about it and the way in which they used it as an instrument of domination of the subordinate people for their own social and political advantage, along with other measures dictated by the peculiar political condition of the country, whose main contours we have already outlined.

The system lacked a consistent theoretical basis; it was

rather a practice searching for a 'theory'. Those who wrote about it were mainly men of practical experience in penal matters engaged, in this or that way, with the everyday operation of the prison life, not penal theorists constructing 'ideals' of prison discipline and theorising on various issues of criminal justice. They became rather the apologists of the existing system, which they tried to explain and justify. Nevertheless, they had their own ideas about the proper organisation of the penal system and, as their reports demonstrate, the Irish system fit their ideas well. Pre-eminent among them were, apart from the Chairman, William Crofton, the first parole agent and lecturer in the Intermediate prisons J. Organ; also T. O'Sullivan, Assistant Roman Catholic Chaplain, M. Harold and Ed. McGauran, Head Schoolmasters; P. Doyle, Th. Shore, J. Black and many others. All these, especially the chaplains of the various institutions, did not hesitate to offer general thoughts on penal issues in addition to their routine annual presentation of their duties. In spite of some differences of opinion on certain points, all of them essentially agreed on their praise for the Irish system, and on some general principles regarding the proper treatment of criminals. They were fascinated by the potentiality of the Irish system to become the panacea against crime, through the reformation of the criminals, or by the effects of long custody, strict surveillance and other repressive measures on those unreformed. They echoed the hopes and fears of their class and for that reason they provide useful clues for the reconstruction of the ruling ideology in relation to the

more important aspects of the problem of crime. We shall try to analyse the basic tenets of this ideology in an effort to place the famous Irish Convict system in its social and political setting, and examine the content and aims of the 'reformatory course' at the level of prison management and at the social and political one. It is suggested here that the purpose of the Irish convict system, in the final analysis, was to create a self-disciplined and acquiescent work force, and to repress the lower strata of the Irish society into a parient endurance of their political status. We shall enquire into the Irish system in greater detail in what follows, and we shall depict the way in which this general aim was operationalised in practice in the long 'reformatory course' of that system.

The First Stage

The long reformatory process of the Irish Convict system originated with solitary confinement at Mountjoy Prison, which aimed to crush any spirit of resistance on the part of the convict, to dubdue his passions and to impress upon his mind his wholesome dependency on the will of the system. Furthermore he was expected to think about his past and his crime, to reflect on his deeds and thus to repent and atone. Finally, in the loneliness of his confinement he was taken away from any source of contamination through bad company, as only good influences were exercised upon his mind by the teachers and the chaplain of the institution. It is evident that the first stage of the new prison discipline in Ireland was not new at all, but was based on the philosophy which gave rise to the

penitentiaries that dominated the penal systems of the world at that time and the preceding years. The first months of confinement at that prison were particularly harsh, the diet was the lowest possible which 'the medical officers dare to permit', and no work was given to break the solitude of the inmate. The long period of nine months under these conditions was enough to deter even the most refractory of the prisoners, and, as it was further lengthened for continuous bad conduct, the final submission of every convict was secured. The lack of intercourse between the prisoners was much dreaded by them, as the governor of the prison testified in one of his reports:

... of the deterrent effects of this system when strictly enforced, there appears to be no question; and this opinion is fully borne out from the great anxiety and solicitude evinced by the worst characters, to be relieved from such restraint by removal to a prison where they could associate and hold free intercourse with their fellow criminals³³.

The Protestant Chaplain of the same prison wrote that 'our discipline is such as must make the offender look upon the commencement of his imprisonment with a salutary dread'³⁴, whereas elsewhere³⁵, he stated that 'some have even expressed an earnest desire that they might be permitted to remain here, confined in their solitary cells, for the entire period to which they were sentenced, so much did they enjoy reading and meditation'. Moreover, the diet was determined by the fear that the adoption of a lower one 'would produce disease and a very serious loss to the public service, in consequence of the

33. Governor of Mountjoy, in Second Annual Report, 1856, p.47

34. Protestant Chaplain (J.Black) in Fourth Annual Report, 1858,p.48.

35. Idem, in Sixth Annual Report, p.23.

want of power of the convict to perform labour'³⁶.

The first stage of prison discipline in Ireland then was planned to subordinate the spirit of the inmates, and to make them docile and available to any external influence made by the authorities. The first sharp shock of the solitary cell paved the way for the reformatory agencies to sow their seed. In Mountjoy the prisoners:

... are forced to think. The mind, undistracted by external influences, begins to assert its supremacy over the mere animal nature, and they learn, by reflection, some knowledge of themselves. Thus, like the ploughed field, the mind is reduced to a state of aptitude for the reception of the good seed...³⁷

And this 'good seed' was mainly sown through the agencies of religion and education. Especially the chaplains, through the paternalism of the pastor and the excited wrath of the divine, exerted such a great influence on the minds of the men, as to make them accept their criminal identity and their subordinate position in the prison, 'I have constantly visited the prisoners confined in solitary punishment, and I have spared no pains to impress upon them the wickedness and folly of their refractory conduct', confessed a Roman Catholic chaplain³⁸. And another asserted that, 'in the critical circumstances .. I felt that the relation of a pastor, in which I stood to the prisoners afforded me facilities of access, of influences over their minds which, if duly availed of, might go no small way in exorcising the demon of insubordination that was driving on certain individuals to headlong destruction'³⁹.

36. Report of the Directors, in Sixth Annual Report, 1860, p.13.

37. Protestant Chaplain (Th.R.Shore), in Eighth Annual Report, 1862, p.19.

38. R. Cath. Chaplain (T.F.Lyons), in Third Annual Report, p.31

39. T. O'Sullivan, ibid, p.37.

It was fundamentally the admonition and the catechism of the chaplain that, by being presented at communicational intervals in the long period of confinement, facilitated the initial hard effort at receiving and developing the raw material coming into the prison in the first phase of the process. Those who understood the message and were prompt to profit from the reformatory influences, demonstrated themselves ready for the second stage of the process; they had shown a certain amount of docility and self-control, so they created hopeful expectations that they would avail themselves to greater efforts at self-improvement and self-discipline, basically by their own exertions alone, in a more complex and more demanding penal setting. Those who stubbornly resisted or were non-susceptible to reformation had their period of solitary confinement lengthened up to twelve months, after which they left Mountjoy but still remained in the first stage, until their conduct justified their promotion to the third class of the second stage, in which those who came with a good character were placed at once.

The Second Stage

The second stage of the Irish penal system was carried out in Spike Island and Philipstown with the convicts working in fortifications and indoor trades respectively. This stage was characterised by a more systematic exploitation of the convict labour force for public purposes, and by a more systematic and intense effort on the part of the authorities to apply positive and constructive methods of reformation. Reformatory agencies like religion, education and industrial training were

employed more energetically, while the marks system, by which the general conduct of the prisoner was variously graded and his promotion in the internal classification of this stage was determined, was used as a method of natural punishment and reward. Special privileges were allowed to the prisoners of any higher class, a certain type of badges and a greater amount of gratuities being the most important among them. If the purpose of the first stage was preliminary, 'to prepare the field for the ploughing', the second stage was seen as the season for the actual cultivation of the prisoner's personality and the creation of a new character. The emphasis now is on the individual exertion induced by the hope of promotion that finally meant earlier release.

The essence of the second stage was the simple psychological principle that one can regulate the behaviour of a man by conferring premiums or punishments. It was observed that 'the hope of reward, and the fear of punishment - one inviting to the observance of the rule, and the other forbidding its violation - are the great moral forces which have been wisely supplied by authority for affecting the reformation of the prisoner',⁴⁰. The badges, the marks and the progressive classification were means in the hands of the authorities by which the conduct of the prisoners was regulated and controlled in a way by which the prison management was greatly eased. These 'emblems of dawning liberty',⁴¹ impressed on the mind of

40. Assistant R.C. Chaplain (T.O'Sullivan) in Third Annual Report, p.33

41. Ibid.

the convict the tyrannical awareness that his position would improve only by his doing what was expected of him to do, and by his earning the necessary amount of marks. 'I look upon even my limited powers for the forfeiture of marks as the most effective weapon in my hands for the privation of prison defaults, idleness and inattention...Convicts would elect the most severe punishment which I could inflict under the rules rather than be subjected to any clog on classification progress', the Governor of Philipstown wrote in his report⁴². The Governor at Smithfield, assured his superiors that, 'the operation of the classificatory system has been most satisfactory' because 'it encourages the well-disposed prisoner to exertion and perseverance, and induces him to devote his time and what is of more importance, his mind, to industry...while the careless and indifferent and even the worst characters are roused to endeavour to obtain advancement in grade'⁴³. The system was characterised also as 'another stimulus'⁴⁴, as 'the most powerful incentive to good conduct'⁴⁵, it was emphasised that it 'worked admirably, and proved a most powerful stimulant to good conduct'⁴⁶, that it was 'a most valuable improvement' and 'quite a desideratum'⁴⁷. This 'very great stimulant to good conduct' was well understood by the convicts and fully

42. Governor (Fr.Hogreve) in Seventh Annual Report, p.53.

43. J. Lamb, Second Annual Report, pp.68-69.

44. Ibid, p.69, Third Annual Report, p.3.

45. Governor of Philipstown in Second Annual Report, p.91.

46. Governor of Spike (P.Hay) in Third Annual Report, p.24

47. Protestant Chaplain (T.R.Shore) in Second Annual Report, p.76

appreciated by them, reported the Directors of the Convict Prisons. They found it to be 'productive of much emulation and general good results'⁴⁸. The Local Inspector reported that 'the system of classification works more satisfactorily. It encourages good conduct, discipline and industry upon the public works. Since its introduction into this establishment, my most sanguine expectations have been fully realised'⁴⁹. Many others shared in the enthusiasm of those quoted above.

Not all concerned were confident on the reformatory value of the system of marks etc. of this stage, especially because good conduct for the attaining of marks might very likely be only external conformity and not a deeper change of character. The case of self-interest was never discarded, but the belief in its eventual reformatory effects was strong too. The Associate Roman Catholic Chaplain of Spike, Tim O'Sullivan, recommended the system of badges and marks for their 'general usefulness and efficacy' and added that 'even for those who may not love virtue or order for its own sake, fear and hope must prove powerful motives in regulating the motions of the will, in insuring their submission to rule and authority'⁵⁰. P. Doyle, Roman Catholic Chaplain at Philipstown admits that it is possible that the system made hypocrites of some prisoners in several instances, but generally approves of it, because:

it also creates a laudable emulation, and elicits a series of acts of obedience, self-denial and order, which notwithstanding a certain want of rectitude in the motive

48. Ibid, p.21.

49. R. Atkins, Third Annual Report, p.21.

50. Assistant R.C. Chaplain (T.O'Sullivan) in Second Annual Report, p.38.

of action, time confirms into lasting habits⁵¹. The Board of Directors saw the system as 'the means of promoting industry, self-reliance and self-restraint on the part of the convicts'⁵². It was 'the best means of realising to the mind of the individual his actual progress, and the cause of that progress'⁵³, hence the 'laudable anxiety manifested by them to obtain those badges'⁵⁴. The Schoolmaster of Philipstown witnessed that the system had 'a remarkable effect in causing a desire to learn and to be thought attentive'⁵⁵.

Some considered the marks system as a means of carrying out the principle of individualisation of treatment, whose effect was 'to make the man's better or worse condition depend directly on his own conduct, with the least possible intervention on the part of anyone else; and thereby to draw out his individual exertions to attain the better and avoid the worse in conduct as well as in condition'⁵⁶. The combination of 'subjective' exertion and 'objective' marking looked as though it put into the hands of the convict the key of his release, making him an all-powerful, almost unique, agent of his fate from then onwards. He was made 'to feel that he is himself the true regulator of his own condition', the 'arbiter of his own fate', as M. Carpenter observed⁵⁷, adding the important

51. R.C. Chaplain (P.Doyle) in Fourth Annual Report, p.99

52. Directors' Report, in Seventh Annual Report, p.6.

53. Ibid.

54. Protestant Chaplain(W. Little) in Second Annual Report, p. 102.

55. Ibid, p.105

56. Four Visiting Justices, op.cit., p.51.

57. M. Carpenter, op.cit., p.32,86.

qualification 'within certain limits'. For, notwithstanding his absolutely perfect conduct, the convict had a minimum of marks to collect, and remained at that stage for at least twenty months until he could pass to the next stage, a step forward to his freedom. The marks and the badges helped to make prison life more acceptable, because they gave the prisoners the impression of free will and self-determination, while their life was determined by four prison walls and by a sentence of penal servitude of four or five years in almost all cases. What the Head Schoolmaster of Spike Island stated was a dramatic assessment of the reality of prison:

Liberty is the desideratum of all captives; the negro is well-fed and cared for, yet he hazards life itself to endeavour to effect his escape. It is absurd to talk of inducements in a prison life, for what is a prisoner under the most favourable circumstances, but a bird in a cage, panting to be a free commoner⁵⁸.

The system of marks, badges etc. was intended to replace the antagonism between prisoners and authorities with the co-operation between them, as the relation of oppression of the former by the latter was neutralised by the common efforts of both to work for the smooth functioning of the system. With the system of marks not only was the treatment individualised, but also the problems of crime and punishment personalised. The prisoners were literally struggling for a mark losing sight of the wider problems surrounding them within the penal and social structure⁵⁹. They were forced to strive to keep their

58. Head Schoolmaster (M. Harold) in Fourth Annual Report, p.70.

59. They were struggling about marks and not against marks and this facilitated prison and penal control legitimisation.

records exact and thus their attention was distracted from issues that very possibly could endanger the peace of the prison and the social order. The Chairman of the Board informs us that on one occasion he occupied full two hours in investigating the complaint of a convict regarding his marks, while a close and frequent check was maintained over the officers in relation to the just allotment of the various marks. The appearance was that 'the rights of even the most fallen human natures' were respected, and the inference was easily arrived at that 'they had been convicts - they were treated as men'⁶⁰. We have seen, however, that they were still convicts, and they were treated as such, the system of inducements of the second stage being but an instrument of disguised oppression that sought to manage the mind of the convicts, to gain their co-operation and 'alliance with the system'⁶¹, to induce them to good, obedient and orderly conduct, and to insure 'their submission to rule and authority'⁶².

In the second stage intensive efforts by the authorities to utilise such reformatory sources as religion, education and industrial training were well under way. Their function and their effects on the inmates, as well as a general appreciation and a discussion of the three stages as a whole, will be attempted in the following part of this chapter, where we shall argue that the aim of 'the reformatory course' was to inculcate on the minds of the inmates habits of industry, self-control

60. See M. Carpenter, op.cit., p.80,54.

61. Ibid., p.89,92

62. Second Annual Report, p.38.

and self-discipline, virtues necessary for an obedient and self-disciplined proletariat and colonial population.

The Third Stage

The third stage of the Irish system was carried out in the 'intermediate prisons' of Lusk and Smithfield, the prisoners working mainly at reclaiming waste land in the former, and employed in various other indoor works in the latter. Eligible for the intermediate prisons were those who obtained the necessary amount of marks in the previous stage, if they had not committed murder or 'unnatural crimes' or were not under a death sentence, unless commuted. It is obvious that a selective process at the technical level complemented that of the progression through the two previous stages; according to the official reports one quarter of the whole number of convicts never arrived at the final stage of discipline for the reasons stated above. The low number of convicts in the whole country generally allowed the authorities to accommodate in the intermediate prisons no more than one hundred convicts, so that the prison population was easily manageable and the 'reformatory' influences of that stage accessible. The purpose of these prisons was to constitute 'filterers between the prisons and the community' and tests of the sincerity of the reformation of the convicts under conditions of less restraint and more temptations, in other words under circumstances approaching to similarity with the life of the outside world⁶³. The prisoners worked under little external control - in Lusk

63. Directors' Report in Second Annual Report, p.14.

there were only six wardens for sixty convicts, no police and a fence one yard high around two huts of corrugated iron - and sometimes they were allowed to go without any escort to the town for delivery of messages, buying of goods and so on. Few cases of misconduct were reported and the authorities rejoiced on the unexpected success. Cases of punishment for acts against prison discipline were not rare, but the most effective weapon in the hands of the officials was their right to send the convict back to the previous stage for even the least misbehaviour, where he was compelled, Sisyphus-like, to begin again his long struggle for promotion in the scale of classification. No marks or badges existed in the intermediate prisons, but the psychological manipulation of the convicts through the operation of hope and fear, reward and punishment, - fear of demotion, hope for the approaching liberty - was again operating at this stage.

One might conclude that the sifting process which was taking place in the two previous stages of the system culminated in the intermediate prisons, where those showing signs of 'reform' were making a step further forward to their release on licence, while those considered as still 'unreformed' were sent back to an earlier phase in the process of development going on in the prison system. This sifting operation was supposed to be more or less reliable, as it resulted from a test of fitness carried out in 'open' conditions, and provided the authorities with the opportunity to more accurately identify the prima facie irreclaimable convicts, and put them out of the way. In any case, a final attempt was made by the

system to give the prisoners at this stage a more advanced and refined taste of the same reformatory forces that had been addressed to them before, like religion, education and labour, in an examination of which we turn now.

The Reformatory Course

The causes of crime for all 'theorists' of the Irish system were found in the individual convict or his close environment and never in wider social or economic structures. They were summed up to a basic deficiency of the mental and moral power of the person to avoid evil and do good, an inner defect of character or inability to withstand temptation⁶⁴. The criminals were persons like all others, who for various reasons had their power of self-control undeveloped, and therefore their 'animal propensities' and instincts had taken sway over them. The Protestant Chaplain at Mountjoy observed that 'their wretched course of life has tended to keep all the more animal propensities in the utmost state of morbid excitement, while the intellectual and reflecting powers of the mind have been allowed to sink into a state of death-like torpidity'⁶⁵, while the same expressed the view more forcefully in the following:

These unhappy violators of the law have not presented any unusual traits of character; they have been men whose selfish and animal propensities have been indulged and strengthened, while the intellectual and moral powers have been either wholly unexercised, or subjected to false and pernicious principles⁶⁶.

64. In an embryonic way we find in the following analysis much of the rhetoric and ideology of the 'rehabilitative ideal' which became dominant in later decades and prevails even in our own time.

65. Protestant Chaplain (J. Black) in Second Annual Report, p.55.

66. Idem, in Third Annual Report, p.70.

There was, for them, a tendency in the human being to evil, as 'man, unfortunately, is more prone to evil than to good'⁶⁷ because of his 'fallen nature', but, generally, external forces rather than 'the inherent weakness of human nature' were at the basis of human criminality⁶⁸. 'Neglected childhood', 'early parental neglect' and 'evil companionships' provided the more frequently voiced explanations of criminality, while other causes were sought for in bad habits like intemperance, indolence and ignorance, even the 'desecration of Sabbath'! Sometimes, various combinations of them were given, like 'intemperance and a distaste for continuous and independent employment' and many others. Only rarely were wider economic reasons like 'the predisposing causes, partial or utter destitution', mentioned, but again it was the individuals to blame, who by their 'distaste for hard, honest persevering labour, which to them and to their class is most loathsome and extremely disagreeable' did nothing to improve their lot and ameliorate their conditions of existence.

Since the evil was personalised, and the crime was explained as an individual characteristic rather than as a social phenomenon, it was self-evident to the Irish penal thinkers that the problem of crime in society could be solved by proper intervention in the life of the individual criminal, and not by efforts at changing the wider social and economic system within which such phenomena appear and grow. Hence, their

67. J. Organ, ibid, p.38

68. For the main causes of criminality see First Annual Report, p.5,30,39; Second Annual Report, p.55,61, 106; Seventh Annual Report, p.75; Eighth Annual Report, p.68.

neglect of the general social, economic and political issues, and their focus on the individual 'deficiency', which could be overcome through appropriate remedial measures and the creation of a new character. A bit of 'environmentalism' that characterised their thought was of little importance as it was directed only to family influences and bad companionships, and did not touch the more general system of social, economic and political organisation of Ireland. An expression and mirror of this ideology of individualising social phenomena was the 'reformatory course' carried out in the Irish convict prisons, whose aim was to transform the criminal characters into new ones, through the application of various influences in the minds of the convicts, in order to make them loyal and productive citizens and willing and industrious labourers.

The individualisation of the reformatory treatment came as a logical conclusion of the 'philosophy' which led to the personalisation of the crime problem, and was largely recognised as a sine qua non of the new discipline. 'Individualisation' James Organ declared 'has always appeared to me one of the greatest and most important aids to success in the reformation of a criminal - I may add the greatest and sole aid. If you desire to reform the criminal you must make yourself acquainted with his past history and future intentions'⁶⁹. Especially the chaplains, whose everyday work was of an individual and confidential character, were strongly in favour of individualisation of treatment, and, one might say, this was decisive for its

69. J. Organ, in Fourth Annual Report, p.129.

introduction and adoption by the penal systems⁷⁰. The Roman Catholic Chaplain at Philipstown was sure that, 'a very limited acquaintance with these prisoners will show that the same mode of treatment will not answer with all, but that the moral culture must vary with the individual',⁷¹. The Four Visiting Justices praised the attempts at individualisation in Ireland, and observed that, 'such cases as that at Chatham show that convicts treated in masses are apt to act in masses, in a way that is highly inconvenient..', thus underlying the advantages of the Irish system over that of England's for guaranteeing a peaceful everyday operation⁷².

Looking closer at the Irish system, we find that the assertions of the system's partisans were somewhat exaggerated upon the subject of individualisation, as in many others. Apart from the chaplains and the teachers, who by the nature of their work individualised their advice and instruction, there was little opportunity for similar measures by other agents. In the first stage, the punishment was strict and the same for all for a certain period of time; in the second it worked only mechanically through the system of marks and classes; while in the third, the nature of the work, at least for all those working in the fortifications, was almost the same. Individualisation did not take place in practice, but the rhetoric about it justified the paternalistic and therapeutic

70. Perhaps it is significant in that respect that solitary confinement and thus individualised imprisonment, had been largely exercised as a method of penance in the Medieval monasteries. The relation with the early penitentiaries has been regarded as close. See G. Ives, History of Penal Methods, London, 1914.

71. R.C. Chaplain in Third Annual Report, p.140.

72. Four Visiting Justices, op.cit., p.50.

attitude of the authorities towards convicts, whose 'sick mind like a sick body' was in need of special care and treatment. The concern with individualisation and the medical analogy of the nature of crime were cause and effect of the personalisation of crime, and therefore further legitimised and confirmed the policies of the authorities in dealing with it at the individual level rather than at the level of the socio-economic conditions prevailing in the country at that time.

The faith of the supporters of the Irish system in its great reformatory power was only reduced by the awareness that not all convicts were susceptible to reformation. All criminals, to be sure, were not the same, and they had not arrived at crime under the same circumstances. As the Board of Directors reported about those in convict prisons:

(they) present every description and shade of character and very various degrees of guilt, crime and depravity; that many of the inmates have fallen from weakness, distress and forces of circumstances, rather than from innate and absolute natural vice; some are more hardened by a longer career in vice and crime, though still not destitute of all proper feelings, not without some good ground for hope of their ultimate sincere repentance and permanent reformation; while others it must be admitted are humanly speaking altogether vicious, almost dead to any good impressions and hopelessly irreclaimable⁷³.

It is clear that the 'reformatory course' was directed only to those in the second category, being un-necessary for those in the first, and totally futile for those in the last. It was the function of the system not only to reform those capable of it but also to 'sift out' of the general criminal population those unreformable or 'incorrigible' or 'irreclaimable' or

73. Directors' Report in Second Annual Report, p.24.

'unimpressible', for whom special individual measures were needed, particularly ways of prevention and protection. It was the main function of the intermediate prisons 'to gather such characters together, and place them in one fold, to be known as the thieving community of the country'. James Organ reported and characterised this group as 'the fixed capital of crime in Ireland',⁷⁴. The awareness that only some of the criminals were not likely to profit from the new prison discipline provided both an excuse for the failures of the system, and a reason for more intense efforts by the officials to work on the many who were capable of reform. And the task was by no means easy, but a 'superhuman work', since 'the edifice which took years in its erection is levelled in an instant; and, as in materials, so it is in morals - the march of degeneracy is quick but the work of regeneration gradual',⁷⁵

If the final purpose of the Irish system was to 'reform' the criminals, whatever this word meant, the need to make them pay for what they had done was taken for granted and therefore not highly debatable in the reports. So, the retributive aspect of punishment was well expressed by the Protestant Chaplain, J. Whately, who justified the quarrying of stones and other hard works by the inmates on the ground that these kinds of labour:

... as they impose severe hardship and may be accounted among the lowest grades of employment are just those with which a convict should be familiar. He has imposed

74. J. Organ in Seventh Annual Report, p.81. He included in this 'fixed capital of crime' pickpockets, brothel frequenters and favourites and ex-paupers.

75. School Headmaster (M. Harold) in Second Annual Report, p.40.

hardships on society, it is only equitable he should receive the same in return. His conscience in the time of endurance bears him testimony that he is receiving the due reward of his deeds - in going through irksome toil and what may be conceived unworthy of a freeman. He feels he is paying a debt to society...'⁷⁶

Whately was an 'advocate for the most irksome and disagreeable sorts of occupysings being put upon offenders against the law of God and society'. In order to illustrate his confession he declared that 'if it were possible to devise some scheme for saving the sewage of our cities and towns, I would be inclined to make convicts the persons for doing the most vile and unpleasing part of the work'⁷⁷. These words spelled out by a divine are characteristic of the mentality of the rulers in relation to the criminals and their value, and goes some way to dispel the commonly held opinion among many contemporaries that the reformatory course in Ireland was an experiment which was marked by 'that spirit of humanity and truly Christian charity'⁷⁸.

Reformation was not intended to be, and it was not in actual practice, lenient to the criminal. On the contrary, the new discipline was characterised as 'strict and improved'⁷⁹ in comparison with the former 'loose and defective system' and the punishment in the country was considered as 'sufficiently severe and deterrent'⁸⁰. We have seen the 'dreadful impressions'

76. Protestant Chaplain (J. Whately) in Fourth Annual Report, p.67.

77. Idem, in Sixth Annual Report, p.41.

78. See Baron Von Holzendorff in M. Carpenter, op.cit., p.80

79. R.C. Chaplain (T.F.Lyons) in Second Annual Report, p.35.

80. Ibid, p.37.

made on the minds of the convicts by the long solitary confinement in the first stage. The general demand of all those concerned with the implementation of the Irish system for longer sentences is further evidence that reformation was not necessarily a more lenient, or more 'soft' kind of approach to the problem of crime. The demand for longer sentences was naturally made for the sake of reformation, as its 'operations necessarily presuppose a considerable lapse of time, as well as a considerable amount of labour, for their accomplishment'⁸¹, but this was likely to increase the hardships, and extend the period over which the convict was under the control of the system. The period of seven years of penal servitude was suggested as the minimum acceptable sentence for the reformatory course to have any lasting effects on the prisoners. The justification provided by the following quotation is typical of many similar:

..It ought never to be forgotten, that reformation is a work of time. No matter how well a boy may be taught and trained, if he is not kept sufficiently long to grow out of his vicious propensities and bad habits, and to grow into virtuous propensities and good habits; further, if the growth be not allowed time to take deep root in his character, the good instructions and judicious treatment, which he received in prison will be lost when he is exposed to the luring temptations of a wicked world. Strength of character is required to resist such temptations, which strength of character time only can give⁸².

It is relevant here to notice that truly indeterminate sentences were not imposed in Ireland for the simple reason that 'reformation' was taking place within the sentences of penal servitude, whose terms were defined by law. There was,

81. R.C. Chaplain (P.Doyle) in Fourth Annual Report, p.99

82. Head Schoolmaster (E.M'Cauran), ibid, p.56.

nevertheless, a bit of indeterminacy even here, as part of the imposed sentence was served out of prison with a ticket of leave⁸³. The demand for longer sentences, that is for greater indeterminacy, might be seen as an awareness of the 'anomaly' of using the 'medical analogy' for explaining criminal behaviour, but treating the 'disease' for a period of time defined by external factors and not by the needs of the 'diseased'. The traditional concern with 'justice' was challenged in Ireland to some extent, but not severely threatened, as in later reformatory movements, particularly in the United States of America; the reformatory endeavour going on in the Irish prisons was crippled by the need to take into consideration the limit which the law provided and the courts set in passing sentence. Up to that limit, however, an extremely intensive effort was under way and many reformatory agencies were employed to accomplish the alleged aim of the Irish convict system, which was the transformation of the convicts and the creation of new characters. Among these reformatory agencies religion, education and industrial training constituted the foundations of the new discipline, and it is a closer examination of them which will be attempted below.

Religion

In a country so religion-ridden as Ireland, it was natural that the high influence exerted by religion and its representatives outside prison walls would be brought to bear within the prisons

83. This is one of the basic differences between this system and the American Reformatories which were based on largely similar 'reformatory' ideology. We shall examine the American system in relation to a different historical juncture in the next chapter.

as well, as the most significant factor for the 'moral regeneration' of the convicts. The aim of reformation being to clear the prisoners from the 'moral taint' and the 'moral leprosy',⁸⁴ of their crime, it was evident that the exercise of moral influences, like those of religion, were of utmost importance. This was accepted not only by the chaplains themselves, who had a lot of reasons to do so, but also by the teachers and other officials, who confessed that their function was only auxiliary to that of religion. 'Religion is the only sure basis for reformation' declared the Head Schoolmaster of Spike Island⁸⁵, while James Organ, the Lecturer at the Intermediate Prisons and first 'parole officer' conceded that religion was 'the great and all powerful element in criminal reformation',⁸⁶. The great advantage of religion over other reformatory agencies was that it 'reached the secret springs and tendencies of the heart',⁸⁷.

As long as the heart, from which proceeds sin, crime and violence of every kind is not changed, there is not, nor can there be, any real reformation. Religion enlightens, purifies and renovates the heart; and at the very time, that she is the very life and soul of true reformation, she furnishes the means of persevering in the path of rectitude even to an end⁸⁸.

For these reasons 'in this reformation religion must have the principal share, in fact it must be fundamental to everything else. The other appliances may powerfully aid the work of religion, but their efficacy would be overrated to consider

84. Head Schoolmaster (M.Harold) in Second Annual Report, p.41.

85. Idem, in Sixth Annual Report, p.43.

86. J. Organ in Seventh Annual Report, p.35.

87. Ass. R.C. Chaplain (T.O'Sullivan) in Third Annual Report, p.38.

88. R.C. Chaplain (M.Cody) in Fourth Annual Report, p.50.

them otherwise than aids'⁸⁹. The change achieved by the religious influences was deeper and more constant than that achieved by 'any temporal motive whatsoever', especially the motives of fear and hope to which the prison discipline was mainly addressing itself, thus ensuring 'an external compliance and submission' but not a deeper moral alteration. And the 'moral improvement of the prisoners should be number one, or rank first'⁹⁰.

The aim of the religious agencies within the Irish convict system was not strictly Christian or theological; it did not try to make good Christians in the sense of well-equipped believers in the doctrine and the ritual of any particular denomination. The aim of religion was rather secular, and its ambition rather colossal: to create good characters out of bad ones. Obviously, the objective of religion was determined by the 'reformatory ideal' of the Irish penal system and was subservient to it. A moralistic tone, relic of bygone years, was not always absent from the various reports, as when the Chaplain of Mountjoy urged that 'the culprit must be convinced by teaching and reflection in co-operation with the grace of God, that in his transgressions it was Almighty God principally he offended'⁹¹, but generally a more earthly concern with the formation of orderly, self-disciplined, industrial citizens, was apparent. Timothy O'Sullivan, asserted that religion 'purifies and changes the heart' but also that it 'makes a prisoner a proselyte to order'⁹². Also,

89. R.C. Chaplain (N.M'Cabe) in First Annual Report, p.42.

90. Presbyterian Chaplain (C.B.Gibson) in Third Annual Report, p.42

91. R.C. Chaplain (N.M'Cabe), op.cit., p.42.

P. Doyle, Roman Catholic Chaplain at Philipstown, after reporting on the annual performance of his religious duties, commented on the importance of religion as a reformatory force:

The experience of another year has convinced me more and more of the value of moral and religious instruction when applied to the prisoners...Human language cannot, in my judgement, overstate its advantages in supplying them with better subjects for reflection, in diverting the current of their thoughts from its noxious channels, and in fertilising their minds for the production of those virtues of industry, contentment and self-reliance, which it is so desirable to find amongst them⁹³.

More than having the important function to help the development of particular virtues in the minds and in the hearts of the prisoners, religion had in addition to accommodate its teachings with those of the prevailing political economy, and preach the holiness and dignity of human labour. Religion should accomplish 'the great work of preparing the mental soil for the seeds of secular knowledge', and should infuse 'into the slothful, indolent mind, a desire to persevere in an honest, industrious career'. More than that:

Religion...raises the labourer to the highest dignity of human existence, the knowledge of the will and the enjoyment of the favour of God. Instructed by religion, the labourer knows how in daily toil he fulfills the duties and satisfies the moral and natural necessities of his existence..⁹⁴

It is evident that religion, as a handmaiden of reformation, had nothing to do with the convict's psyche and his preparation for 'eternal life' but concerned itself with the task of legitimising the 'work ethic' of Protestantism and helping to create an industrious, content, self-reliant and orderly

92. Ass. R.C. Chaplain (T.O'Sullivan) in Third Annual Report, p.38

93. R.C. Chaplain (P.Doyle), ibid, p.140.

94. James Organ, Sixth Annual Report, p.89

labouring population, who considered their 'daily toil' the 'highest dignity' of their existence! We shall see in a moment that the other reformatory means were also directed at implementing almost the same ends in a variety of ways.

Education

The role of education as a reformatory force was never denied by the practitioners or the theorists of the Irish convict system. Education consisted of an effort to impart some elements of general knowledge to the convicts, to teach the the three 'Rs' and generally to exercise their mental qualities as to enable them to deal more easily with the complex situation of the outside world. School instruction was given mainly as a preliminary or parallel course to the industrial training of the convict. Its importance was ranked only after religion, being itself 'utterly inadequate' to regenerate the human character, but an 'invaluable subordinate and auxiliary' to the higher influences of 'grace and truth'⁹⁵ by which the sinner is made a 'new creature', 'a happy auxiliary and preliminary to the higher lessons of the Gospel of God'⁹⁶. The more general aim of education was to inculcate in the hearts of the men principles and virtues which were necessary for their life outside or inside the prison walls. The Head Schoolmaster at Mountjoy summarised the role of education in the following words:

95. Presbyterian Chaplain (W.Wilson) in Third Annual Report, p.72.

96. Idem, in Fourth Annual Report, p.51.

Its aim must be to engender self-respect so as to induce shame, to teach the arts of reading, writing and arithmetic.. to infuse a love of honest industry, to cultivate and exercise the reflective and reasoning powers, to foster kind feelings, to instil sound principles, to uproot perverted notions of 'right' and 'wrong' and to promote good habits⁹⁷.

Habit change was also considered to be an important function of education by the Head Schoolmaster of Philipstown, who reported that 'I firmly impress on their minds the necessity of honesty, of self-dependence, industry, self-respect and perseverance..' ⁹⁸. The same had reported that he was endeavouring to make school instruction subservient to the end of reformation 'by inculcating principles of self-dependence' and by 'restraining those evil propensities which have brought them into crime, that they thus may re-enter society, intelligent, reformed and self-controlled men' ⁹⁹. In his second report the Roman Catholic chaplain at Philipstown expressed his certainty that the educational department 'will give a new direction to their (prisoners) thoughts, enlarge their mental faculties, create habits of industry and self-reliance' ¹⁰⁰. It is clear that the function of education was broader than the mere injection of information and the exercise of the intellect alone; it was directed towards the transformation and the moral improvement of the whole character of the convicts, in concert with the other reformatory agencies.

The reports of the various agents of the Irish system, although in favour of education generally, betrayed an apparent

97. Head Schoolmaster (M.Harold) in Third Annual Report, p.74

98. Head Schoolmaster (P.Farrelly) in Sixth Annual Report, p.62

99. Idem, in Fourth Annual Report, p.101.

100. R.C. Chaplain (P.Doyle) in Second Annual Report, p.103

anti-intellectualism, as they were against 'giving the criminal a high literary education',¹⁰¹. Education should be compatible with the position of the prisoners and of practical usefulness, not the communication of secular knowledge for the sake of knowledge itself, because 'a smattering of knowledge is sometimes an evil to the person who has acquired it; as it fills him with notions of his own excellence, he becomes too proud to labour',¹⁰², observed Michael Harold, Head Schoolmaster of Spike Island, while the 'protagonist' James Organ, plagiarising him, reported that 'over-educating criminals has in my opinion, a tendency to create in them an aversion to hard labour, and to render them more liable to look upon their illiterate fellow-prisoners as being inferior to them',¹⁰³. For the same reasons, when the Local Inspector suggested an increase of time allowed to education, he added that they should do that 'as far as can be done consistently with the public works',¹⁰⁴.

The time allowed for school instruction every day did not extend beyond two hours and consisted mainly of teaching of the three 'Rs' in classes organised in a way that all prisoners of the same prison and of the same level of literacy were taking the same lessons. The report of the Governor at Smithfield is illustrative of the intellectual composition of the prisoners at that prison. 'The percentage of prisoners

101. J. Organ in Sixth Annual Report, p.87.

102. Head Schoolmaster (M.Harold) in Fourth Annual Report, p.71.

103. J. Organ in Sixth Annual Report, p.87

104. Local Inspector (R. Atkins) in Third Annual Report, p.22.

'fairly educated' is 1.5 and the percentage of those approximating to 'fairly educated' is 2.3 giving a total of 3.8; the remaining 96.2 percent being almost without education',¹⁰⁵. The various schoolmasters were later able to report a much more improved picture of the educational level of the prison population both quantitatively and qualitatively. Nevertheless, the great percentage of illiterate men within the prisons confirmed the administrators' view of ignorance as a source of crime, which 'not only incapacitates men for the rightful discharge of those duties which they owe to society, it also leaves free ingress to the mind for temptations to all the overt acts of gross iniquity',¹⁰⁶. Hence, the effort of the educators was directed to teach the convicts useful and practical elements of knowledge as indispensable and constant help in finding and maintaining jobs particularly, but for all the walks of their life outside the prison walls in general. Apart from a high level of proficiency in writing, reading and arithmetic, the convicts were also introduced to the fields of geometry, geography, history etc., depending upon the level of their general progress.

The knowledge imparted to the prisoners was extended from an innocent communication of mere encyclopaedical information to a more or less direct indoctrination to a particular system of political and economic organisation. Elements of political economy were taught to 'brainwash' the audience, and simple events or elements of the intellect were selected, analysed and

105. Governor (J.Lamb) in Second Annual Report, p.64.

106. Ibid, p.55.

explained for the same purpose. The Roman Catholic Chaplain of Fort Carlisle stressed in his report that:

with the exception of scripture history, there is no subject I attach more importance to than that of political economy. Erroneous notions regarding wages, rise and fall of provisions, competition in trade, railroads and machinery, have been a public source of poverty and crime. To eradicate these opinions in the rising generation is an object of great importance to the peace and well-being of the community¹⁰⁷.

It was the purpose of education to eradicate these 'false' ideas from the minds of men, and explain to them in a persuasive way how society was organised, why this organisation was 'right' and why this social order was 'natural'. Hand in hand with the political indoctrination to the virtues of capitalism was going the exaltation of the Divine Wisdom as the creator and sustainer of order in the universe and society.

The only reason that led to the social compact was the need to protect the property which 'man, as a provident being, acquires', lectured Michael Harold¹⁰⁸, and went to great pains to demonstrate 'the direful effects of violating that compact' and 'the obligation every man is under to support the compact'. The necessity for the existence of individual property was in the minds of educators coupled with the inevitability of the existence of people with more property than others. Social inequities were only 'natural' in society, and it was only a 'prejudice' that the upper classes oppressed those below, James Organ asserted:

107. R.C. Chaplain (M.F.O'Mahony) in Fourth Annual Report, p.54

108. Head Schoolmaster (M.Harold) in Third Annual Report, p.50

I lose no opportunity in endeavouring to remove from their bosoms those early prejudices they entertain against the rich, whom they consider to be the oppressors of the poor; these prejudices they inherited in many cases from their vicious and ignorant parents, and the difficulty of removing them can be estimated by those who know the perverse and misguided opinions of the true convict class¹⁰⁹.

Special endeavours were also made to justify the way in which the relations between employers and employees should be governed, with the aim to cool down the 'revolutionisation' of the labouring class. By these lessons, the prisoners were:

...led to see the folly of strikes, how destructive they are to the permanent welfare of working men, promoting only the interests of cunning leaders, who are supported often luxuriously on the sacrifices made by their deluded followers¹¹⁰.

Lectures were delivered about temperance and self-control, to admonish and warn that, according to the Holy Writ itself, 'the drunkard shall never enter into the Kingdom of Heaven'. Others dealt with various countries of the world, but only to 'garnish' geography with an instigation for emigration, as that paragraph which closed a long geographical lesson on Canada: 'rest assured that if Canada has wealth, Canada will afford you every opportunity, every facility to honestly acquire your share. Yes, seek this shore'¹¹¹. Not in all lectures was the epimyth kept for the very last sentence, but in every case one was drawn out, of immediate importance for the prisoners and fitting the general reformatory scheme of the officials. Simple lessons about 'the ocean and its mysteries, of the earth and the wisdom displayed in its structure, of the

109. J. Organ in Seventh Annual Report, p.77

110. M.D. Hill, quoted in M. Carpenter, op.cit., p.20.

111. J. Organ in Third Annual Report, p.105.

atmosphere and its uses, and of the firmament and its beauties,¹¹² were given not only as attractive subjects for discussion, but also because they provided opportune moments for the impression of the minds of the convicts 'with the wisdom, the majesty and power of Providence, which may be shown to them and proved to them in the meanest and simplest of his works',¹¹³. It is clear that chrestomathy and political indoctrination were the two ways by which the Irish system endeavoured through education, to accomplish the aim of reformation of the convicts.

What education, and therefore reformation, was trying to do within the Irish prisons, and what was its important function in the wider social and political setting of the country, is crystal clear from the following eloquent excerpts from James Organ's reports to the Directors:

...Industry, and its rewards they are taught to appreciate. Vice and its consequences they are exhorted to avoid; the justice and the impartiality of the laws they are taught to admire and respect...

...Again, how is respect for superiors, obedience to the laws, gratitude for the acts of the good and the humane, and admiration of the wise and the great, to be engendered in hearts where crime and viciousness, hatred and revenge long reign triumphant. How, I repeat, are men who from boyhood considered the English Government their oppressors and the laws of the country partial and unjust, to be impressed with the erroneousness of such opinions and the folly and injustice of such prejudices...

I have endeavoured to impress upon them that every man is bound to obey his superiors, to obey the inculcations of his religion, to be temperate, honest, self-denying and patient. I have endeavoured to show them that labour is the lot of all, and he who will not work to support himself in honesty is a traitor to his God and false to his manhood¹¹⁴.

112. J. Organ in Fourth Annual Report, p.124.

113. Idem in Seventh Annual Report, p.76-77.

114. Fourth Annual Report, pp.128, 131.

Not only were the convicts 'reformed' to attain the good habits of a patient and self-denying labourer, but also to be got rid of various 'prejudices' regarding their political status and the political situation of their country, and become orderly and obedient citizens. The same function of 'political legitimacy' attempted in the convict prisons of Ireland was also revealed by the Head Schoolmaster of Spike, who, while alluding to the political dimension of the Irish crime, tried to de-politicise it and to personalise the evil, in concordance of course with the 'reformatory' ideology and practice:

...I have learned by experience that the class I am instructing generally entertain strong prejudices against the laws and government of the country, considering them the causes of their bondage (as they term it) without reflecting, until taught and brought to do so, that the thorns they are reaping are of the trees they planted, and that the fruits they gather are the produce of the wild seed they sowed¹¹⁵.

The purpose of education and reformation, therefore, was to eradicate from the minds of the convicts any such 'misunderstanding' and convince them of the 'folly' of their ideas. The same Head Schoolmaster gave an architectural analogy to illustrate the exact function of the educators in prison:

... my fellow labourers and myself look on our schools, not merely as places of imparting literary instructions, but also as mediums of practically moralising and training those attending to habits of decorum and social order, of inculcating the principles of right and justice, and of controlling the vicious passions. We are, in fact, less employed in teaching than unteaching and undoing what has been taught and done by evil example, vicious habits and vile companions during years. Our operation consists in taking asunder, as it were, the old well-grouted but evil edifice, stone by stone, and erecting on its site a structure, perhaps less durable, at least in some instances, but at all events intended to be devoted to better purposes¹¹⁶.

115. Head Schoolmaster (M. Harold) in Fourth Annual Report, p.71 (his emphasis)

116. Idem, Seventh Annual Report, p.43.

Work

One fundamental element of the Irish system was also the importance given to work, both as a method of exploiting the labour power of the convicts and as a reformatory agency. The Board of the Directors in their first report already emphasised the significance of work in both dimensions: 'We do not consider the profit which may accrue from the labour of the convicts to be the first or more important object, still it, doubtless, is very desirable that so large an amount of labour should not be misapplied or lost to the country...'¹¹⁷. Also, that 'industry, which we apprehend to be one of the most important elements in the reformation of criminals...'¹¹⁸.

The prisoners laboured in all three stages in various employments, except for the first three months of separate confinement at Mountjoy, where they were only picking oakum, because 'if prisoners were put to work immediately upon their reception they would regard the labour as a portion of their punishment, and treat it accordingly; but when even the most indolent gets a physic, so to speak, of idleness for a little while in separate confinement, he feels that to have nothing to do is terrible irksome, and begins to long for some sort of employment, which if he gets, he regards as a privilege he will take care not to forfeit', explained the Head Schoolmaster of the prison, Edward M'Gauren¹¹⁹. 'If they had active employment they would have used it as a means of escaping from reflection' added Th.R. Shore, Protestant chaplain of the same¹²⁰. In the

117. First Annual Report, p.12.

118. Ibid, p.11.

119. Seventh Annual Report, p.31.

second and third stage the convicts were employed in association in various kinds of public works, and, from the financial viewpoint, they were reducing the costs of the system not unimportantly, making, for example, Lusk a self-supporting establishment. Neither was the quantity of work small. The Local Inspector reported that in the Intermediate prison at Camden Fort 'I consider the amount of work done to be equal to that which would be expected from an equal number of paid labourers',¹²¹. The Irish system, in sum, had not been free of the long prevailing practice of exploiting the convict labour power.

The importance of labour as a reformatory force was held in high estimation, in theory if not in actual practice, as it was the foundation stone for the creation of industrious and willing labourers, able to cope with the increasing demands made upon them by the new type of work in the industrial setting. The aim of the system was to inculcate in the minds of the convicts the great value of industry, and train them to a spontaneous and effective capacity for industrial labour. Therefore, not only was the acquisition of industrial skills and trades an essential part of the system, but also the inculcation of industrial habits, like self-denial, productive personal exertion, regularity, industry, etc., was a necessary supplement for the development of an acquiescent and assiduous

120. Protestant Chaplain (Th.R.Shore) in Eighth Annual Report, p.19.

121. Local Inspector in Sixth Annual Report, p.32. The Superintendent of Smithfield reported his conviction that 'the Government could not be better served by free labourers' in Eighth Annual Report, p.64.

labouring class. James Organ thus expressed the crucial importance of labour for the 'reformation' of the convicts:

In fact nothing in my mind conduces so powerfully to the reformation of criminals young or old, as steady, persevering labour. Train them up to that labour which brings the sweat upon their brows; 'teach them to avoid those vicious indulgences which rob the labourers of his strength.. Impress them with the honour and dignity of honest labour point out to them the pleasures and the joys resulting from successful toil...¹²².

Hence, the efforts of the authorities to 'infuse in them a taste for honest labour',¹²³ and to implant in the convicts 'habits of industry, and the furnishing of them with a means of honest livelihood when discharged from prison',¹²⁴ through the teaching and training of various technical skills, as shoemaking, carpentry, etc., etc. 'The employment of the prisoners in acquiring some useful trade' appeared to the Presbyterian Chaplain of Smithfield as 'exceedingly beneficial', not only from a fiscal point of view for the system, but also for the criminals themselves, as 'many of the men have acquired or are acquiring industrious habits and useful avocations', which, it is hoped, will 'prevent temptation to crime and afford them the means of earning an honest and a competent livelihood in after life',¹²⁵.

There was no doubt that industry had to be taught 'since honest and independent labour was only known to them by name

122. Sixth Annual Report, p.89. The same suggested that 'to cultivate a desire for hard honest toil in the minds of these men, is one of the most difficult tasks that any reformatory agent could be engaged in'. Seventh Annual Report, p.80.

123. Ibid, p.90

124. W. Little, Fourth Annual Report, p.98.

125. James Edgar, Third Annual Report, p.118.

previous to their last conviction', and because they presented a 'distaste for hard, honest, persevering labour, which to them and to their class is most loathesome and extremely disagreeable',¹²⁶. They had, therefore, first of all to be made to work, and afterwards to be trained in trades and acquire habits and skills. Surely, 'to induce the town-pickpocket, the strolling vagabond thief, the fearless and daring burglar and the indolent and vicious pauper-reared criminal to pursue and settle down to hard labour is a task of the greatest difficulty', Organ observed, as these were 'men to whom an honest calling was never practically known, and whose faces the sweat of honest toil never moistened',¹²⁷. The reformatory process in Ireland was especially designed to accomplish this purpose, and it was a moment of great enjoyment for one Head Schoolmaster to report that 'the white, delicate, effeminate hand of the pickpocket is soon turned into the sunburnt, rough, hardy hand of the toiling labourer',¹²⁸. The reports of the various administrators are frequently referring with satisfaction, to the 'cheerfulness and activity',¹²⁹ in the different departments of labour. 'I have frequently stood and watched unobserved the men employed...They felt a joy',¹³⁰... observed someone, while another stressed that 'an increasing and a general feeling of cheerfulness and contentment pervades the whole establishment',¹³¹ in Smithfield. In Lusk 'from early

126. J. Organ, Eighth Annual Report, p.68-69.

127. Idem, Seventh Annual Report, p.75.

128. Ed. M'Gauran, ibid, p.23.

129. Eighth Annual Report, p.64.

130. Ibid, p.73

131. Fourth Annual Report, p.145.

morning until the approach of night, these men cheerfully and continuously prosecute the labours of the farm'¹³². In the prison of Spike Island 'a great amount of cheerful and willing industry is generally exhibited by the convicts employed on the public works..¹³³. At Smithfield again the prisoners 'evinced a kind, obliging disposition and a docile spirit; .. they go to work with alacrity, they are ready to volunteer their assistance.. they seem to have gotten a new spring of mind'¹³⁴. Even the medical officer at Smithfield noticed, apart from the 'improved sanitary state of the prison' an improved state of feelings, which 'in the workshops it is manifested in the cheerfulness, alacrity and assiduity with which they apply themselves to their laborious occupations, and furnishes a striking contrast to the listlessness, sullenness and gloom, so commonly exhibited by the ordinary convict in similar circumstances'¹³⁵.

What was regarded of greater importance, however, was the fact that the same 'cheerfulness' was presented after the prisoner's release, and the authorities were delighted to report that 'we find at the present moment in the city of Dublin, the most daring, the most fearless and most ingenious burglars settled down to honest and certainly most slavish labour'¹³⁶. This was a convincing proof for the administrators

132. Eighth Annual Report, p.72.

133. Second Annual Report, p.20.

134. Third Annual Report, p.108.

135. Ibid., p.113

136. Eighth Annual Report, p.71.

of the successful operation of the 'reformatory course' carried out in the Irish prisons, as one of the primary aims of reformation was to transform the listless and indolent criminals into assiduous, cheerful and willing labourers, able to be introduced 'into the home labour market' and 'physically as well as morally qualified to take their place amongst the labouring population..',¹³⁷. The Superintendent at Smithfield and Lusk expressed his satisfaction from the result in the same vein:

It is pleasing to reflect how many of the prisoners released on licence, or absolutely discharged, are now absorbed amongst the honest labouring class, earning industriously their own livelihoods and preferring their¹³⁸ humble homes to the haunts of vice and a career of crime.

Early Release on Licence

We have already seen that ticket of leave had not been introduced in the Irish Convict system from the beginning, because the Board of the Directors considered that the lack, then, of a true 'reformatory course' in the Irish convict prisons did not justify early conditional release. The ticket of leave was regarded as a sort of 'guarantee' that only convicts who had been reformed should be permitted to go out of prison under a ticket of leave. Also, the great number of convicts remaining at the various prisons, and due to be freed after the expiration of the terms of their newly imposed sentences of

137. Sixth Annual Report, p.14.

138. Seventh Annual Report, p.72.

penal servitude, made the adding to this number of those released on tickets of licence not deemed 'safe or expedient'¹³⁹. So, although the Board of Directors and founders of the new scheme were appointed in 1854, the first tickets of leave were granted at the beginning of 1856 to those who had successfully passed through all the scaling and classificatory system leading to the acquisition of a ticket of leave. Some categories of convicts were from the start excluded from this possibility, but the great bulk of the offenders, when arriving at the intermediate prisons, were eligible for the privilege, if the authorities had been convinced of their reformation.

The internal organisation of the penal system and the whole 'economy' of the reformatory process in Ireland made the ticket of leave an integral part of the system, and the stage which continued and crowned the uninterrupted series of grades that manifested the progress of convicts towards their eventual release. There was, therefore, a close interconnection between this last phase of the system and its preceding stages, and each one completed the work of the other in the common purpose. The Board of Directors in their annual reports declared their belief in 'the continuance of the system'¹⁴⁰, and suggested that 'the system must be taken as a whole':

Intermediate prisons would, without the assistance of conditional liberation and registration, be of themselves incomplete; so, on the other hand, without the preliminary treatment of intermediate prisons conditional liberation would be incomplete and unsatisfactory in its results. The system must be taken as a whole to be of full value¹⁴¹.

139. As the Directors reported in their Second Annual Report, p.26.

140. Fourth Annual Report, p.19.

141. Sixth Annual Report, p.12.

A wider interpretation of this paragraph, so as to include - apart from the intermediate prisons - the first two stages of the Irish system, seems to be nearer to the mind of the Directors and closer to the reality, as our analysis in this chapter has already shown. James Organ believed that the stage of ticket of leave and supervision was 'the great and crowning point of the Irish system of convict management',¹⁴² and thus underlined the great significance of this stage and its structural integrity with the whole system.

The function and the role of ticket of leave for the Irish convict system was multi-dimensional. At the level of prison management it constituted the strongest incentive to good conduct within the prison, as all efforts of the convicts aimed at its attainment, which coincided with the realisation of their hope for freedom. All prison discipline with its various and complex classification, marking and allotment of punishments and small rewards was so planned and designed as to lead the convicts to (or hold them from) the ticket of leave and the mitigation of their sentence. This constituted the grand reward of the system, and with its all-pervasive power helped in the manipulation of the convicts' mind, as 'the hope of reward is one of the most powerful incentives to good conduct and willing industry' and 'there is no reward appreciated more by prisoners than a mitigation of their sentences', as the Head Schoolmaster of Mountjoy wrote on the basis of his long experience with convicts¹⁴³. In this respect, ticket of

142. Eighth Annual Report, p.70.

143. E. M'Gauran, Fourth Annual Report, p.56.

leave was the final result of a mechanically applied psychological principle, that fostered conformity to external rules, while a deeper change in character was uncertain.

The problematic nature of reformation of convicts within prisons supplied ticket of leave with another function at the administrative level, making it the instrument by which the extent and the sincerity of reformation could be finally tested under conditions of real life out of prison. We have seen that a kind of testing was taking place in the intermediate prisons, with their 'open' conditions and the chances given to convicts to visit for a while the town for special missions, but this was not regarded so reliable, because of the 'custodial' - although somehow 'open' - conditions in the former case, and because of the just momentary exposure of convicts to temptations in the latter, which both precluded any sure assessment of the change effected in the convict character. 'The test of a man's reformation ... is not to be found within, but without the prison walls' warned James Organ as it was for the 'after life' they prepared them, and not the protectionist, controlled environment of the prison setting¹⁴⁴.

With the role of ticket of leave as a testing apparatus went hand in hand its function as a kind of guarantee to the community that convicts passing successfully the period of their tickets had been 'reformed', and therefore were able to be again accepted as free citizens. Sometimes, the administrators regarded even the granting of ticket of leave as in itself

144. Sixth Annual Report, p.86.

a guarantee of reformation, although inconsistently with the previously mentioned role of ticket of leave as a testing instrument. This was due to their over-optimistic expectations of the reformatory power of the three prison stages; also, to reasons of expediency, as they were trying to persuade employers in the community to employ 'reformed' ticket holders. More generally, when 'the reality and sincerity' of the reformation of the convicts was fairly and publicly tested there emerged 'the most favourable chances for their gradual absorption into the body of the community',¹⁴⁵. Ticket of leave, given after a process like this, with the image of the changed criminal it created and the various safeguards accompanying it, helped to make easier the transition from prison to society for the convicts, and promoted feelings of tolerance and acceptance in those outside. In another sense, ticket of leave was regarded as a bridge between prison and society, to provide for an even more gradual adjustment of the convict to the common life, after a long period in an artificial institutional setting.

Furthermore, ticket of leave was regarded as a control mechanism which checked the behaviour and movement of the convicts and kept them away from their previous life of 'vice and crime'. The various conditions accompanying the granting of tickets were intended to be 'a salutary check and a constant reminder' that every misconduct would result in the immediate revocation of the ticket¹⁴⁶. This was going to impede the

145. Director's Report in Second Annual Report, p.23.

146. J. Organ, Sixth Annual Report, p.88.

commission of further crimes, and also to consolidate and confirm the reformation achieved so far, through the additional opportunity given to the ticket holder to realise that 'freedom and honesty, if to be enjoyed at all, must be enjoyed at a price, namely, self-denial and self-dependence',¹⁴⁷. The restraint and repression provided by the ticket conditions was variously regarded as a protection to both the community and the criminal. Community was guarded from the infliction of further crimes, while the criminal was protected 'against the influence of those who would turn him back to wickedness' and was given 'a shield against many mischiefs and many misconceptions', as the Attorney General lectured in Dublin in 1861¹⁴⁸.

The justification provided by the penal administrators and theorists for the convict's being followed after release on licence was based on the premise that 'especially when a convict is set at liberty before the expiration of his sentence, has the community a right to demand that every possible precaution shall be taken, against his abuse of the liberty thus allowed him beyond his right',¹⁴⁹. The numerous conditions endorsed in the tickets were but expressions of society's precautions to counter-balance the effects of a release earlier than originally planned. On the same grounds, ticket of leave was considered as 'an act of clemency' or a 'privilege' granted at the discretion of the prison authorities, in spite of the impression given by the system of graded progress

147. Ibid

148. Quoted in M. Carpenter, op.cit., p.49

149. Four Visiting Justices, op.cit., p.81.

in the internal structure of the reformatory course that continuous good conduct and individual exertion on the part of the convict through all the various stages created fair claims to it as a right. Nevertheless, good conduct was counted as the most significant criterion for the granting of tickets. Other criteria are not known to exist, apart from some indication in the official reports that no convict obtained a ticket of leave without having already secured an employment outside¹⁵⁰, either by his personal efforts or by those of his friends and relatives. James Organ, who assisted the convicts in this matter, informs us that by his initiative the convicts were induced to take the 'temperance pledge' from a clergyman of their religious persuasion, and that about two thirds of them acceded to that¹⁵¹. This, however, was neither a criterion for release, nor a special condition attached to the ticket, but one of the many interferences of an unofficial character that aimed at seconding official policies for the implementation of reformation.

Conditions of Release

The 'licence to be at large from the day of his liberation under this order, during the remaining portion of said time of penal servitude', according to the relevant Acts of 1853 and 1857, was filled with instructions and special conditions for the convicts, whereas a complete description of the ticket holder was written on the back of the form. The provisions of

150. Governor P. Hay, Third Annual Report, p.24.

151. Ibid, p.86.

the law regarding the ticket of leave were literally the same in England and Ireland, and had almost copied the colonial system, especially that operating in Western Australia. The difference between the Irish and the English system was rather in practice, since whereas the conditions were in England 'practically a dead letter' they were in Ireland 'a living reality', as the Four Visiting Justices concluded in their Observations¹⁵².

The holder was made responsible for preserving his ticket and producing it whenever and where ever called by a magistrate or police officer. He had to obey the laws of the country, and not commit further crimes. If he led 'an idle and dissolute life' or associated with 'notoriously bad characters' he had his licence revoked, even without the commission of any crime. He had to report to the police of his residence immediately upon his arrival there, and afterwards on the first of each month or more frequently. He was not allowed to change his place of residence without previously having kept the police informed of his new address. Every transgression of these conditions resulted in the revocation of the licence.

The enforcement of conditions in Ireland was more than strict. The Board of Directors boasted that 'we do not believe that the case can be proved of a convict having been reported for infringing the conditions of his licence and still remaining at large in this country'¹⁵³. William Gofton's

152. Four Visiting Justices, op.cit., p.82.

153. Seventh Annual Report, p.9.

evidence to the Royal Commission of 1863 gave the same picture:

With regard to the supervision in Dublin, nothing can be more strict, for when anything bad is heard about a man his licence is revoked immediately¹⁵⁴.

So, upon the slightest misconduct or indication that the convict was going 'to relapse into crime' his licence was forfeited, even 'if we found that a man was within a fortnight of the expiration of his sentence... for the sake of principle', according to the same evidence of Crofton. Needless to say, that the strict enforcement of the regulations regarding tickets of leave presupposed a well organised system of supervision and surveillance of the ticket holders; and this did exist in Ireland. Released convicts in the rural areas were supervised by the constabulary, a well organised network in the whole country, while those residing in Dublin were supervised by a civilian in close co-operation with the police. The name of this indefatigable man, who was also Lecturer at the Intermediate Prisons, was James Organ; not only was he the parole officer of that period, but also an erudite theoretician of the Irish convict system and a valuable, for us, source of information. What is of interest to note here is that police supervision in the country was introduced in January 1857, one year after the commencement of supervision at Dublin, because most of the convicts were flying to the country in order to avoid the strict Dublin surveillance. It is also of great importance for our understanding of the Irish

154. Royal Commission of 1863 (Evidence Crofton). Quoted by Carpenter, op.cit., Vol.II, p.97. As the Directors reported 'we do not believe that the case can be proved of a convict having been reported for infringing the conditions of his licence and still remaining at large in this country' Seventh Annual Report, p.9.

system to repeat here that it was not only ticket of leave holders who were liable to police supervision, but also those released in the ordinary way, after the expiration of their whole sentence.

Supervision after release was considered as a fundamental element of the Irish convict system, as it formed its 'great and crowning point',¹⁵⁵. The practice recommended itself for its usefulness and expediency, as it acted 'beneficially to the community as well as to the well-conducted criminal'. A typical justification for it was provided in the following remarks by the Board of Directors of the Prisons:

We must not rest satisfied with the discharge of the criminal of many years growth as a well conducted prisoner. If the prisoner's training has been of the right description, it will show itself beyond the prison walls. For our sake and for his own we should follow him; his training is incomplete unless we do. We must exercise such a supervision as shall aid him in his good, and restrain him from his evil intentions.... Such a supervision, acting detrimentally to the well intentioned and newly-released convict, would be by the abuse, and not the use, of an important police duty. It is a momentous subject, the key-stone of all our troubles, and should not be rejected on light and insufficient grounds¹⁵⁶.

James Organ, who was in favour of supervision 'by all means, both for the sake of the criminal as well as for the protection of society', considered it along with 'long sentences, long licences ... and a faithful compliance with the conditions of a ticket of leave' as 'the best means of repressing crime as a profession' and underlined 'the soundness and the wisdom of the idea which first suggested the supervision of the liberated convicts', a business which he interpreted as a mission 'rather

155. J. Organ, Eighth Annual Report, p.70.

156. Fourth Annual Report, p.19.

to advise and assist', in contradistinction with that of police, which was just that of 'watching'. However, he admitted that he did a great amount of surveillance as well, in a way that it differed very little from that carried out in the country by the constabulary¹⁵⁷.

Back to the ticket of leave, the great number and nature of conditions endorsed upon it constituted a serious curtailment of freedom for the released convict, so that he was and felt as semi-free, that he stood 'on the land of freedom with one leg only' in Organ's metaphor¹⁵⁸. The justification for this was provided by the idea that he was serving his sentence in another setting and it was only natural for him to be surrounded by certain responsibilities peculiar to his position. Neither was his situation outside prison so rosy or his circumstances of crippled freedom a source of pleasure. On the contrary, the holding of ticket was a cause of many unhappy feelings. James Organ admitted that:

...to the really reformed and well-disposed man the holding of a ticket of licence is source of manly pain, so to speak, and until it is withdrawn he does not consider himself free. On the other hand, the ticket of licence exercises a wholesome dread on the adept in crime... the holding of a ticket of licence exercises a more salutary effect on the man himself, and when the system is carried out in its integrity, affords a guarantee to his employer of his good conduct so long as he retains it...Were the public fully to understand the real state of the ticket of leave man's affairs, they would be more inclined to pity him than to condemn him and throw obstacles in his way¹⁵⁹.

157. J. Organ, Eighth Annual Report, p.70-71

158. Idem, Fourth Annual Report, p.121

159. Ibid, p.134 (his emphasis)

The Directors were sure that the public had understood the operation of the system and reported that 'we are not aware of any case in which the public have been aggrieved by the continuance at large under such circumstances of the offender',¹⁶⁰ Not only were they willing to employ ticket holders, also they asked for them, and sometimes even trusted them with jobs of a confidential and supervisory character. They felt 'comparatively secure from acts of dishonesty or bad conduct' on the part of the offenders, because of the restraint imposed on them by the conditions of their licence and the close supervision by the authorities¹⁶¹. They knew everything about their employees' background and penal history, whereas special attempts were made to keep it secret from colleagues and other persons. James Organ testified that the ticket holders were invariably preferred by the employers to those unconditionally discharged, because they were under more control. 'The question generally put by employers who have wealth and loose property lying about is 'How long have the Government control over these men?' They are always led in a very great degree by the number of years yet to run..¹⁶². The Four Visiting Justices met one industrialist who employed a considerable number of men, at that time fifteen. He told them that he considered them to be not only as good as, but better than, the generality of labourers, because their consciousness that they had a lost character to regain, produced

160. Sixth Annual Report, p.7.

161. Four Visiting Justices, op.cit., p.99.

162. Quoted by M. Carpenter, op.cit., p.110.

in them a greater steadiness and effort to do well¹⁶³.

According to James Organ again:

Providing employment is by no means an easy task, and were it not for the good conduct and self-reliance of the men themselves, all my efforts to carry out this most important branch of our system would be useless and unavailing...Frequently during the year has the demand for men trained in the Dublin Intermediate Prisons exceeded the supply; nor could it be expected that they should, whilst the labour-market is well supplied with men who never perhaps tenanted a prison cell¹⁶⁴.

Ease in finding employment after discharge was a necessary step for the success of the whole system and the 'satisfactory termination to the reformatory treatment'¹⁶⁵. As the Directors reported, without the co-operation of the employers outside, and 'if means cannot be devised to induce the community to hold out a helping hand to re-establish the reformed criminal, all schemes for their improvement and reformation within the prisons, however ably devised, however zealously carried out, must be comparatively fruitless'¹⁶⁶. Ticket of leave, and the control which it exerted on the holder, was such an 'inducement' to gain and secure the co-operation of society for the acceptance of the released convicts. Not all released convicts remained in Ireland. In spite of all assurances for the availability of jobs in the country, many of them emigrated to England and other countries overseas. Emigration was suggested to the convicts in various ways and fostered by the system as a valuable substitute to transportation, on the grounds that 'such a course would tend to amend the

163. Four Visiting Justices, op.cit.

164. As quoted by the Four Visiting Justices, op.cit., p.93.

165. Second Annual Report, p.13.

166. Ibid, p.25.

criminal, and be both advantageous to the mother country and the colony,'¹⁶⁷ or that the 'combination of the reformatory system at home with the removal of many of them to a foreign shore would seem the most efficient means of protecting society in these islands, and of contributing to the zeal and welfare of the unhappy prisoners themselves,'¹⁶⁸. Frequent reminders of the advantages of emigration had the non-surprising effect that 'a large and an increasing number have left and are leaving the country, the limited amount of their means alone being the impediment,'¹⁶⁹. James Organ reported for the year 1860 that as many as 'nearly one half of the convicts discharged from these prisons (intermediate prisons) during the past year, have sought new fields for their honest labours in distant lands, where their antecedents are not likely ever to appear against them,'¹⁷⁰. The whole context of Irish history suggests, however, that behind this tide of emigration of Irish convicts lay not only a search of employment overseas, but also a welcome alternative to the depressing political and social circumstances of Ireland and her strict and repressive penal system, whose impact was strongly felt even after the expiration of the imposed sentence.

The confidence of society was due not only to the controlled status of the ticket holders but also to other factors, as the Four Visiting Justices thought. The fact that the licence was given to convicts after their arrival and remaining for

167. Sixth Annual Report, p.6 fn.

168. Third Annual Report, p.73. (Report of W. Wilson, Presbyterian Chaplain)

169. Fourth Annual Report, p.15.

a while at the somewhat 'open' conditions of the intermediate prisons reflected a kind of trust in the convicts on the part of the authorities. Therefore:

When the public see this confidence on the part of the authorities; when they see a man conducting himself well under such circumstances as those of the Irish Intermediate Prisons, it tends to restore their confidence in him and to raise a reasonable presumption that he may conduct himself well under circumstances of greater liberty and that they may venture to employ him, with less apprehension of inconvenience from so doing¹⁷¹.

On the other hand, the Board of the Directors expressed the hope that the careful selection of convicts for the intermediate prisons might convince the public of the difference between those unreformed and those 'not utterly irreclaimable', and that 'by degrees they will become willing to extend a helping hand to such as may really prove themselves deserving of their aid and encouragement'. Without the test of intermediate prisons preceding the granting of tickets, and based only on the convict's good prison character 'what guarantee can anyone have, that in giving employment to a released convict, he is not harbouring a depraved and irreclaimable criminal, if he has no means beyond this 'prison character' of learning anything of him..' asked the same Board, in an attempt to justify the ready 'assistance' given by the prison authorities to the employers, through intelligence regarding the employees and through various checks over their conduct and behaviour¹⁷².

The close co-operation between the industrialists and

170. Seventh Annual Report, p.78 (J. Organ).

171. Four Visiting Justices, op.cit., p.78.

172. Second Annual Report, p.24.

the penal administrators, and the willingness displayed by the former to support the successful implementation of the Irish convict system, testify to their basic adoption of the aims of the 'reformatory course', as well as to the significance attributed to it for its socio-economic and political value. Giving employment to convicts was not a matter of individual humanism, but a means of political expediency. According to James Organ, when an employer employed a discharged convict:

it is not through sympathy for the convict himself, but through a spirit of benevolence to aid in carrying out a system which, if properly supported, will enable every honest and well inclined criminal to find a place in the ranks of the honest poor¹⁷³.

Supervision and Surveillance

We shall see now how the supervisory apparatus operated in the country and in the town of Dublin, by examining the various reports of the Irish penal administrators, those of James Organ in particular. It will be clear that the supervision of the convicts under conditional or ordinary release was practically nothing less than a strict surveillance of previous and future criminals, with the purpose of keeping them 'within reach', knowing their whereabouts and, therefore, making the commission of further crimes by them difficult or their apprehension easy. At another level, supervision after release was a means of finally identifying the 'difficult' criminals, for whom special repressive measures were needed. Moreover, it acted as a final check of the readiness or not of the ticket holders to take their place into the ranks of

173. J. Organ, Seventh Annual Report, p.79.

the honest poor, lest some of them passed through the funnel of intermediate prisons after a mistaken estimation of their true character by the prison authorities. Generally, supervision after release, along with the practice of registration, had nothing to do with the released convict's personal welfare and interest, but constituted a measure of aggression against, and suppression of, the lower classes in Ireland, and, given the political situation of the country, part of the more general plan for the total subordination of the Irish people within the colonial context of the Anglo-Irish relations we have already outlined at the start of this chapter.

The supervision of convicts in the country was carried out by the constabulary. There was a notification made to the inspector-general of the constabulary the moment a man was liberated, stating to what district he was going; the man then registered with the head of the police, stated what he was going to do, where he was going to be employed, and reported himself to him once a month. If he moved from that district, his registration was transferred from the district he was at that time, to the one to which he went, so that he was traced from one place to another. According to William Crofton's evidence:

He must come himself once a month, and report himself to the police, but it is evident that the police do not confine themselves to that, for, knowing where he is, they would look after him a little oftener, without interfering with him¹⁷⁴.

174. Quoted in M. Carpenter, op.cit., p.99.

In spite of all these, the same was able to state that there was 'no undue espionage or oppression practised by the police'¹⁷⁵. On the other hand, James Organ admitted that the 'chief business' of the police was to 'watch'¹⁷⁶.

In the town and county of Dublin, supervision was carried on through the laborious efforts of James Organ, who declared that his own 'chief business' was 'rather to advise and assist'¹⁷⁷. The way, however, in which he organised his activities and carried out his duties, drawn from his own reports, demonstrate that in practice there was little difference between Organ's supervision and that of police. In fact, one might say, it was stricter and closer, as well as more pervasive, especially for those under ticket of leave, as it penetrated every moment of the life and work of the released convict through direct surveillance or, more often, through disguised paternalistic concern for the convict's welfare. In addition, he worked in close co-operation with the police; it was the Board of the Directors and the police, who had the final word in every case, thus superseding his, if any, acts of 'care' and 'advice'. He admitted in his reports that he very often acted on his mere suspicions, undertook criminal-hunting expeditions at every hour of day and night, and aspired at the absolute repression of crime in his district.

The officers of the Detective Police force were unanimous in their approval of the system of licence. They were well

175. Ibid, p.97.

176. Eighth Annual Report, p.70.

177. Ibid.

acquainted with the antecedents of almost every prisoner in the Dublin gaols and had always been willing to assist Organ 'in discovering the haunts and accomplices of those men under his supervision' whom he 'suspected of leading dishonest and irregular lives',¹⁷⁸. In his evidence to the Royal Commission of 1863 Organ thus described his daily work:

...when I find that a man is not going on according to my liking, and he has something suspicious about him, I go to the director ...or when the director is not in the office and the case is an urgent one, I do not wait for the director to come the following morning, but I go straight to the detective office at the Castleyard; I there tell the officiating inspector my doubts and he, as a matter of course, has a close eye upon that man. Then in cases of suspicion I inform the detective authorities; they know that it is their interest and my interest to work hand-in-hand...¹⁷⁹.

Not only was Organ a prison officer appointed to work as a liaison official between prison and police, but also a police officer himself in civilian clothes, whose mentality and operational method was very similar to those of police. The above quoted part of his report illustrates the repressive and tyrannical way in which supervision was exercised in Dublin, where the chief business of supervision was allegedly not to watch, as the police did in the country, but to advise and assist. Mere suspicions about a man, or the fact that a convict was not going according to Organ's 'liking' were enough to alert the law enforcement agencies and fasten invisibly the strict 'network' of the system around the

178. Sixth Annual Report, p.88.

179. As quoted in M. Carpenter, op.cit., p.110. See also his remarks in Sixth Annual Report, p.88, and Seventh Annual Report, p.76: 'in the event of my having sufficient grounds for my suspicion I never fail to make known these grounds to the proper police officer'.

suspected ex-prisoner!

The visitations by the supervisor were made fortnightly, even weekly, to the places of residence or work of the ticket holders. Sometimes, they were made 'at hours when least expected',¹⁸⁰, and should he not find them at their rooms at these hours, usually of the evening or night, he notified this irregularity to the authorities. Every fifteen days he compiled for the Board of the Directors a visitation list, where he reported in every detail the results of each routine or surprise visit, with special emphasis on the convict's record of work. Close communication was also maintained between the supervisor and the employers. Not only was Organ policing those in his charge; he was himself policed by his superiors. According to William Crofton, a special Detective Inspector of the Police was attached to him in cases that presented difficulties for Organ:

...If Mr. Organ found in his visits that there was any obstruction to his obtaining from the convict full information, he was at once handed over to the observation of the police, in order that they might see very closely whether there was any chance of his infringing his licence.. This detective inspector attended at my office two or three times a week, and when he had any notice of failures, as he had sometimes, he used to tell me of them; he consulted with me, and then made a return immediately of the exact state of the case. We had thus a direct police check upon Mr. Organ's reports..¹⁸¹.

Crofton also admitted that generally he had 'constant communication

180. J. Organ, Sixth Annual Report, p.68.

181. In evidence to the Royal Commission of 1863, quoted in M. Carpenter, op.cit., p.96.

with the detective officers in the Dublin police', and that 'they were a very material assistance' in carrying out supervision¹⁸².

There was another link between released convicts and police, which again aimed at keeping the latter in direct touch with the former for a better control and policing of the criminal class. The amount of gratuity owed to the convicts for their work in prison was not given them at once at the time of their release, but, apart from a small sum of money, was paid after three months by and in the police station of their locality.

Apart from direct policing, Organ was engaged in some other activities of a more advising and aiding content. These activities were aimed at the implementation of the 'reformatory ideal' or were consistent with it. We have already referred to his initiative to impose upon the released convicts the temperance pledge, which was rather part of his duties as Lecturer of the Intermediate Prisons. Another important duty of Organ, self-imposed but approved by the Directors, was the securing of employment after release. Elements of control are obvious even in this, however, as the finding of employment and the continuous interest after it provided easy access to the places of work, ties of co-operation with the industrial employers, and, therefore,

182. Ibid, p.97. J. Organ reported that between prison and police authorities a 'spirit of the kindest feeling exists. We are all working in a good cause' and that 'the police authorities and myself co-operate in the kindest manner' Eleventh Annual Report, p.68, Twelfth Annual Report, p.74.

facilitation of the convict's tracing, at least during the working hours of the day. On the other hand, provision of employment constituted a necessary adjunct of the prison system, because only by putting the released convict under conditions of hard persevering labour was it possible to check and test the success of 'the reformatory course', whose main aim was just to create industrious and disciplined hard labourers. In a sense, Organ was helping the convicts in finding employment, in order to help the system check which of them were unable to secure employment and thus prima facie in need of further reformatory influences or other 'more aggressive' measures. Even at this stage he did not stop teaching and preaching to the convicts the basic principles of the Irish system; the political and other indoctrination continued even now, and the aim to suppress the 'uneasy' feelings in the heart of the poor convicts was pursued in good harmony with the general aims of the penal system. When he met any convict in a condition of difficulty and despair 'for reasons above his will':

... and should he murmur at being now and then compelled to feel privations, through want of employment or through illness, I take the opportunity to point out to him the patient endurance of the honest poor under circumstances quite as severe...¹⁸³

He was very glad to report for 'the great majority of them' that they 'have settled down to humble honest employment and are now absorbed among the regular working classes of the country',¹⁸⁴. The same had acknowledged that 'whilst prisoners

183. J. Organ, Sixth Annual Report, p.84.

184. Seventh Annual Report, p.83.

are in custody, we have endeavoured to infuse into them a taste for honest labour',¹⁸⁵, since their relapse was due to 'a distaste for hard, honest, persevering labour',¹⁸⁶ on the part of this class of men. He had been convinced that nothing 'conduces so powerfully to the reformation of criminals, young or old, as steady, persevering labour',¹⁸⁷.

Two further activities of Organ are worthy of note, as examples of his earnest endeavours to realise in the best way the principles and aims of reformation. These activities constituted methods of intervention in the lives of the convicts of a more positive character than mere policing. The first was an effort to inculcate in the minds of the men the values of accumulation and thrift, and to familiarise them with the habit of saving money. He informs us that they got used to that, and indeed they formed a loan fund to assist each other in cases of need, of course on his initiative. The second activity consisted of Organ's efforts to influence the attitudes of the men towards marriage. According to his reports, he encouraged marriage 'whenever I considered it for their good, and likely to conduce to the comfort and happiness of their partners and themselves',¹⁸⁸. We have no evidence of the likely effects of any refusal on the part of the convicts to accept or conform with Organ's advice and suggestions. We can only assume that such situations were perceived as

185. Sixth Annual Report, p.90.

186. Eighth Annual Report, p.68

187. Sixth Annual Report, p.89

188. Eighth Annual Report, p.69

indications of 'immaturity' and 'stubbornness' of the criminals, and very probably raised Organ's 'suspicions' about the moral condition of the convicts with the well known consequences.

Other activities of J. Organ are reminiscent of modern 'casework' practices. He reported his endless efforts to establish a type of communication between himself and the convict or ex-convict. 'If an invalid I visit him in the hospital, and there converse with him. In the prison yard likewise I talk with him, and we talk over his hopes and fears of the future; and when discharged I visit him at his home and make myself acquainted with his circumstances, habits, family affairs and domestic arrangements. I sit with him, converse with him, provide for him as well as I am able, exhort and advise him'. As a 'primitive' social worker he acquainted himself with the personal and family problems of convicts and ex-convicts: 'the old men consult me upon their private affairs; the father asks me to gather together his wandering children, whom, perhaps, he has not seen for years; the former drunken and profligate husband solicits me to go in search of his wife, and negotiate a reconciliation between them; and the prodigal son importunes me to find out the whereabouts of his aged parents, that he may assist them'¹⁸⁹.

From what we have written above, we could conclude that the two pillars upon which ticket of leave was based in Ireland were (a) revocation and (b) supervision. Revocation was taking place not only because of commission of a new crime, but also because of behaviour not criminal, but constituting

189. J. Organ, Fifth Annual Report, p.131, 123.

technical infringement of the conditions of the ticket. The existence and the strict enforcement of the various conditions manifested the semi-free status of the ticket holders and acted as a sword of Damocles over their heads, restraining them from going astray, and harnessing their conduct to acceptable channels of obedient citizenship and industrious and acquiescent labour. When the convict had his licence forfeited he was obliged to come back to prison and serve the remaining part of his sentence. A second granting of licence was not prohibited, but, usually, the available time was not enough for a prisoner to go up the scale of stages again and arrive at a position to reclaim a ticket of leave. Revocation of licence was a device that underlined the simply temporary nature of that phase of penal discipline, depended on the conduct of the ticket holder, objectively described and subjectively interpreted by the authorities. It was this uncertainty for the permanency of the situation that was hanging over the convicts and checked their behaviour, tyrannising their minds.

The importance put by the Irish administrators on supervision has been already demonstrated. It was characterised as 'a momentous subject',¹⁹⁰, and as the 'great and crowning point of the Irish system of convict management',¹⁹¹. The main purpose of supervision both in the country and in the town of Dublin was the better policing of the ticket holders

190. Fourth Annual Report, p.19.

191. J. Organ, Eighth Annual Report, p.76.

and those ordinarily released. The whole organisation of supervision and the way it was carried out showed that surveillance was the chief aim of the authorities; they watched, followed, dogged and traced every convict to curb his freedom of movement, to embarrass and restrain him, and make him well aware of this. The object of this close observation at home and work was, according to the officials, to prevent the commission of further crimes, and to easily detect committed ones. The practice of registration and the use, for the first time, of photography were auxiliary means to the same end. The Board of the Directors suggested that by their use crime might be rendered 'a hazardous and an unprofitable calling',¹⁹², while William Crofton accepted that the purpose of supervision was 'to surround, by every possible means, the commission of crime by obstructions',¹⁹³. The Four Visiting Justices observed the operation of supervision in Ireland and concluded that 'there can be no question that such a system as this is a most powerful deterrent from crime, because it produces so much greater certainty of detection'; in more general terms they argued that 'the value of supervision which shall act as a restraint upon those who might be inclined to fall back at that critical period is incalculable',¹⁹⁴. Finally, James Organ, after analysing his methods of supervision, reported to the Directors:

192. Sixth Annual Report, p.11.

193. As quoted by M. Carpenter, op.cit., p.100

194. Four Visiting Justices, op.cit., p.34.

Hence it is that no discharged convict in my district, and whose name is returned in my visitation list, can continue in a life of crime without detection. By pursuing this course, you Gentlemen, can easily perceive how the repression of crime is effected in the district under my supervision...¹⁹⁵.

Furthermore, supervision, more than repressing crime in Ireland, suppressed, at another level, the criminal class and, given its composition, the lower classes. The well organised network of police forces in the whole country, their close co-operation with the prison authorities, the special duties of the supervisor in Dublin, the over-zealous and autocratic way in which he carried out his work, together with the stereotyping of criminals as men possessed with 'prejudices' against the rich, the government and the laws of the country that the English had created, gave supervision a wider function than mere crime prevention; all made it an instrument of suppression of the social and political resistance advanced by the lower strata of the subordinate people.

In another sense, supervision, as a main element of the Irish convict system, constituted an extension of the state control over criminals, since it introduced systematic surveillance of areas of private and social life which had been relatively free of that control before. This was achieved, as we have already seen, by means of direct interference in the life of the offenders through 'police' operations by the detectives or the supervisor, like visits at home and work at every time of the day and the night, general espionage and following to check whether the conditions of the ticket were

195. Sixth Annual Report, p.88.

observed or not, and, of course, the numerous cases of the convict's reporting to the police. In the case of ticket of leave, the extension of the state control over its criminals is more apparent in the various conditions endorsed upon it. Independently of the nature of each one of them, the rule that 'to produce a forfeiture of the licence it is by no means necessary that the holder should be convicted of any new offence',¹⁹⁶, which was applied in Ireland very strictly, meant that the ticket holder was punished for acts not necessarily criminal, and this was an increased power of the State over this part of the criminal population. General and vague terms like 'communicating with bad characters' or 'leading an idle and dissolute life', in which the conditions of the ticket were written, were open to wide interpretations as to include everything 'suspicious' in the behaviour of the convicts, and, therefore, allowed the intrusion of the state in areas of individual conduct that were relatively free of state control before the introduction of the ticket of leave.

The conditional release and the supervision that followed it, as well as the supervision of liberated convicts, extended state control over the criminals in another qualitative sense. It allowed the ruling authorities to intervene in the private, everyday lives of individuals, with a view to change the modus vivendi of each separate criminal and affect his close environment. This supplemented and continued, outside prison, the efforts of the authorities to transform the character of

196. According to the Penal Servitude Acts of 1853 and 1857.

the convicts and modify their previous habits which had taken place within the various institutions of the Irish system; ticket of leave and supervision, however, were more effective means of achieving this same end, as the interference of the system with the lives of the men was exerted under the natural conditions of the real life, outside prison, and in a way that affected the immediate environment of the convicts (family, relations with friends, etc.) beyond, and in addition to, any individual influence. Easy access to places of residence and employment, frequent visitations day and night, check and censure of the leisure activities and recreational opportunities of the convicts, control and censure of their communications and links with friends and colleagues, the whole cluster of paternalistic concern with their general interests, as well as the constant reminding of what was expected of them in order to show their reformation and prove that they were not leading 'idle and dissolute' lives, constituted the introduction of the small end of the wedge of state power in areas of life of the convicts least affected before the innovation of the ticket of leave. The rulers aimed at changing the habits and way of life of the convicts, inculcating in them their own values and way of life, and assimilating them to the 'better classes'.

We have seen that the impression made on the convicts by the mechanisms of supervision was one of 'human pain' or 'wholesome dread', whether they accepted the system or not. In any case, all of them agreed on the fact that it curtailed their freedom. James Organ himself revealed that:

I have found that, no matter how cautiously and prudently my own supervision is carried out, its effects are felt by all prisoners discharged on licence, and considered by them more or less contrary to their ideas of liberty..¹⁹⁷

If this view of supervision from below was held by those conditionally released, it is logical for someone to propose that heavier opinions were held by those who had served all their sentence, but had not yet been 'liberated'.

It is of crucial significance for our study to repeat here that although the legal framework was identical for Ireland and England, both conditions of licence and the supervision after release remained a 'dead letter' in England¹⁹⁸, but not in Ireland. Police supervision was considered here a serious encroachment on the liberty of the individual, and, therefore, 'unsuited to the spirit of our institutions' as Joshua Jebb, Chairman of the Board of the Directors of the English Convict prisons, wrote in a letter in 1856¹⁹⁹. The same argued in a memorandum written five years later, and defended his previous view in a similar vein:

The fact is that, although restrictions are unnecessary in the case of the many who intend to do well if they can, they operate with a repressive effect on the few who would do evil if they could. If the sheep could be divided from the goats, one great difficulty in dealing with the subject would be removed; but the question is whether it would not be both unjust and impolitic to subject the majority to the prejudicial consequences of restrictions on their liberty in this country for the sake of a more effective control over the minority, who alone require them?²⁰⁰

197. Fifth Annual Report, p.128.

198. As the Four Visiting Justices observed, op.cit., p.82.

199. Quoted in his memorandum, in Reports of the Directors of Convict Prisons for the Year 1860, London, 1861, p.1.

200. Ibid, p.xxx (his emphases)

Conclusion

After the general examination of the ticket of leave and supervision after release, as the final stage of the Irish convict system, we shall try now to summarise the basic objectives of the system and its functional significance, socially and politically, for Ireland as a colonial appendage to the English Empire. We have seen that the fundamental aim of that famous system of treating convicts was expressed by one word alone: 'reformation'. Although nobody provided us with a definition of this term, almost everybody of those who have written about it seems to have a tacitly held notion of it. This could well be expressed as a general transformation of the criminal character into a new one. As the Roman Catholic Chaplain at Mountjoy suggested:

It is necessary to rid them of habits which had become to them a second nature; to subdue passions which they had scarcely ever before restrained, and to invest them with entirely a new character²⁰¹.

This was to be achieved through application of a specially constructed prison discipline, and by utilising a variety of appropriate agencies, as religious influences, educational instructions and professional training. Reformation was possible only if and when the criminals were in a position to understand and engrave on their hearts the cardinal values of life, which the system was trying to implant in them, like 'self-control and self-dependence', 'habits of order and self-denial', 'the spirit, the habit of order and subordination', 'habits of decorum and social order', 'habits of industry',

201. Mich. Cody, Seventh Annual Report, p.20.

'willing and ready obedience', 'industry and self-restraint', 'provident and industrial habits', 'self-reliance' and so on. One might suggest that these values were pivoting around two axes: obedience (order, self-control and the like) and industry. Both of them are closely inter-related and complement each other but while the former is more relevant to the situation of a man as a member of an organised society and state, the latter is more relevant to the situation of a man as an agent in the productive process of society. In other words, the basic aim of reformation in Ireland was to interfere with the two principal aspects of human existence in an attempt to create good citizens and good labourers, and, therefore, suppress the lower strata of the Irish society to a patient and resigned endurance of their social and political status, and simultaneously develop a self-disciplined and acquiescent work force²⁰².

Since the prisoners in Ireland were overwhelmingly drawn out of the wretched multitude, the aim of the Irish penal system was to return them to the same social strata, but after infusing them with such virtues as could enable them to find a place 'among the ranks of the honest poor'. 'The immediate object' wrote the Head Schoolmaster of Mountjoy, 'is to get him to embrace every opportunity within his reach to prepare himself for the approaching fight of life's stern battle, a struggle

202. The Roman Catholic Chaplain suggested that in the Irish prisons 'nothing was left undone to change the convict into a good and honest citizen', Ninth Annual Report, p.46. J. Organ expressed his gratification to see that after release ex-convicts 'gladly face the most slavish work, and patiently endure the privations occasionally arising from want of employment'. He also attributed the success of the system to the fact that it afforded convicts the opportunity 'of once more entering upon an industrious course, and to become absorbed among the working classes'. Eleventh Annual Report, p.65,67.

in which he must engage, if he means to earn bread as an honest man', as the same continued: 'nothing is left undone to fit the prisoner to face a world where competition runs very high, and where all their powers of mind and body need to be healthy and vigorous',²⁰³. The purpose of reformation, therefore, was to supply weak and undeveloped personalities, like the convicts, with those qualities which would enable them to socially survive in the hard world.

The apologists of the Irish convict system were convinced that the purpose of reformation had nothing to do with the social or political elevation of the Irish convicts; it aimed only at their personal transformation, so that they could accept their position in the social and political scale without protest. The social and political reality of crime had thus disappeared; the developing process taking place in the Irish convict prisons intended to have qualitative effects on the character of deficient personalities. Therefore, it was implicitly an instrument of political and social legitimacy of the Irish administration and the English colonial state for that. What the Irish convict system was designed to do is also evident in the various remarks and comments made by the agents of the system when the 'reformatory course' was coming to an end and the released convict was taking again his position 'among the labouring population',²⁰⁴. The change of attitudes, ideas and values on the part of the ex-convicts was something that delighted the

203. Ed. M'Gauran, Seventh Annual Report, p.23, 24.

204. Sixth Annual Report, p.14.

penal administrators and pointed to the great and unsuspected success of the system. James Organ was able to report after his many visitations at the places of residence and work of the ticket holders that they were giving 'the most complete satisfaction':

They are honest, sober and industrious. Many of the married men are often sorely pressed by the high price of provisions, but they generally bear their condition in a cheerful and unshaken spirit of honest patience and self-reliance. I have visited some of them in wretchedly poor lodgings; I have seen them badly fed, badly clothed, enduring much hardship and wishing for, and asking nothing but, continuous employment²⁰⁵.

While in prison, the convicts were infused with 'a taste for honest labour' and they were educated, as we have seen, not for the sake of knowledge, but as men 'destined to handle the trowel or the saw, the spade or the pick-axe, or carry the hod'²⁰⁶. Their training was 'peculiar' to their position, and 'as far as possible suited to his future humble and it is to be hoped, useful and honest occupation'²⁰⁷. The results were as planned:

In the fetid filthy sewers of the city and in factories and vitriol works adjacent to it, are to be found the once fearless and daring burglars and ingenious pickpockets, working from an early hour in the morning till the close of evening, breathing a disagreeable and unwholesome atmosphere and giving the honest labour of their bodies for about 18 pence a day - a sum upon which they looked with a robber's contempt in their former days of indolence and ease'²⁰⁸.

'Hunger was felt by many of them during the winter of 1859 and sad and gloomy were their homes' reported Organ²⁰⁹. They were made able, however, to endure the difficulties without protest.

205. J. Organ, Third Annual Report, p.83.

206. Idem, Fourth Annual Report, p.123.

207. Idem, Seventh Annual Report, p.76.

208. Ibid.

209. Ibid, p.79.

It was the same James Organ, key figure of the Irish convict system, who captured the whole 'philosophy' of the system in a few, but so much expressive, lines. The 'sole object' of the system, he said was to:

...prepare criminals to take their place amongst the honest industrious poor, and with them bear their disappointments and trials with the same resigned and submissive spirit²¹⁰.

Resignation and submission at the social level was translated into subordination and loyalty at the political level, which in that historical juncture of Ireland meant willing and cheerful acceptance of the colonial order. The 1850s and 1860s were one of the most disturbed periods in Irish history marked by the rising Fenian Movement in 1858 and numerous civil riots. It is well known that the period 1855-1874 has been called the Age of Riots in Belfast. The panic which befell upon the ruling authorities had an impact upon the Prison Directors as well, but they were delighted to report that no indication existed that any released convict in the Dublin district was 'tainted' with Fenianism²¹¹, a value-loaded term, coincidentally, which is indicative of both the political orientation of the Directors and the dominant ideology they espoused. We have already analysed the political function of the Irish convict system not only as an ultimate and overdetermining objective, but also as an immediate goal of explicit political indoctrination. The

210. Ibid. Or as the Roman Catholic Chaplain of Spike, F.T. Lyons, admitted 'my greatest ambition is to see an habitual thief cease his criminal profession and take his stand amongst the humble and lowly toiling multitudes, and like them be content with his lot, and glad even to call the cellar or the garret his honest home' in Tenth Annual Report, p.61.

211. Twelfth Annual Report, p.59.

success of the system was gauged by the degree of 'loyalty' to the colonial rulers it had been able to inspire in an overwhelmingly nationally and culturally inimical population. The 'conspiracy' of Fenianism, as James Organ termed it²¹², provided them with undisputable evidence that the penal system of Ireland was totally successful in achieving this aspect of reformation as well: the 'evil spirit of Fenianism' had not been able during the current upheavals to infect Irish ex-convicts.

James Organ congratulated himself and boasted that:

... not one man who ever passed through the intermediate prisons was charged with Fenianism ... the loyalty of my men was tested and proved not wanting ...²¹³.

The Irish convict system, then, not only 'solved the problem of crime'; in more subtle ways it helped in suppressing the Irish lower classes and legitimating the English colonial rule there.

Addendum

Crofton resigned in 1862 and Organ died some years later but the Irish penal system outlived its 'founding fathers', although under some administrative difficulties. Those who neither reject nor over-estimate private initiative or individual effort may not be surprised to find that the system worked well even under their successors²¹⁴. The number of convicts in Ireland diminished from 1,575 to 1,143 between 1863 and 1873, Smithfield discontinued in 1869, while Lusk was still in operation with only 60 convicts.

212. Ibid., p.75.

213. Ibid.

214. A retired police officer named Crowe succeeded Organ and carried out his duties 'very successfully', evid. Barlow, 9890-1, Report of the Commissioners into the Working of the Penal Servitude Acts, P.P., 1879, vol. 23-24.

Noticeably the Commissioners of 1879 were able to report that the opinions of the various witnesses concurred on that 'the system of supervision works well in Ireland',²¹⁵.

In the meantime England found herself in a situation of great pressure for a substantial strengthening of her penal control apparatus as transportation of convicts to the colonies was coming to an end. An alarming increase of robbery with violence, the famous 'garrotte robberies' in the London district, as well as a supposed increase of crime in the early 1860s led to a great concern with law and order in society. As a result of this panic a Royal Commission was appointed in 1863 to examine the working of the systems of transportation and penal servitude and report 'whether any and what alterations, amendments or improvements may be beneficially made in the law now in force',²¹⁶. They found the system of penal servitude as administered in Britain not 'sufficiently dreaded' by the criminal classes in general, due to the shortness of the sentences, the lack of supervision after release and the difficulty of detection of those who had been convicted before. In consequence they urged for measures of increased severity in the penal system, like longer sentences for reconvicted offenders, better means of identifying the habitual criminals, lower dietary and lower gratuities, a system of marks as indicators of progress and reformation, and transportation to W. Australia of those convicts who were fit to labour in the colony. Most importantly, they recommended that the remission of the imposed sentence ought to be earned by good conduct and industry, that the licence ought to be revoked for every misbehaviour, that those released with

215. Ibid., para. 63.

216. Report, 1863, op.cit., p.7.

tickets of leave ought to be set under 'effective control and supervision' by the police or especially appointed officials like Organ in Ireland.

In this chapter we have had the opportunity to refer many times to the more repressive nature of penal control in Ireland, particularly in regard to the conditions of licence and supervision after release when compared with the more relaxed English situation. Not only the warm admirers and supporters of the Irish convict system like Carpenter, Hill or the Four Visiting Justices, but also official bodies liked to see a more stringent British Convict system, along the lines of 'the Irish experiment'. If Jebb considered such measures as 'unsuited to the spirit of the institutions of this country' the Committee of the House of Commons resolved in 1856 that 'the conditions of licence ought to be enforced more strictly than appears to have hitherto been the case', and that 'every convict on his release with a ticket of leave ought to be reported to the Police of the town or district to which he is sent'²¹⁷. However, until 1863, 'the supervision of convicts on licence was very imperfect' while the power to revoke licences for misconduct or disreputable mode of life without judicial inquiry had been sparingly exercised²¹⁸. It was a sad time for the Commission of 1863 to report that 'no measures have hitherto adopted to exercise a supervision over convicts on ticket of leave, beyond what is implied in the mode of paying their gratuities'²¹⁹; therefore they suggested more effective controls after release, most of which the Penal Servitude Act of 1864

217. Resolutions 15 & 16 of the Select Comm. on Transportation, 1856, P.P., v. XVII

218. Report, 1879, p.xi.

219. Report, 1863, p.16.

transformed into legal regulations. This Act defined the conditions under which a licence was to be granted (to produce it when required, to abstain from any violation of the law, not to habitually associate with notoriously bad characters, not to lead an idle and dissolute life) and made the transgression of any such conditions an offence summarily punishable with a term of imprisonment no more than three months. The police were empowered to apprehend without warrant licence holders suspected of an offence or of having broken any condition of their licences. The licence was made revokable for any breach of its conditions, while the ticket holder had to report himself to the police of the district within three days of his arrival, and subsequently once a month, and notify them about any change of residence. Any forfeiture or revocation of the ticket meant that the ticket holder had to serve the remainder of his original sentence, plus any sentence imposed for the new offence, if any.

The system was further refined and improved by the Habitual Criminals Act of 1869, which was replaced later by the Prevention of Crimes Act, 1871. Constables were empowered under conditions to take into custody any holder of ticket of leave suspected of getting his livelihood by dishonest means and bring him before a court of summary jurisdiction. Every ticket holder had to report to the police once a month, and immediately after discharge to notify his place of residence to the chief police officer of the district, and to give notice of any subsequent removals. More generally, registers were to be kept of all persons convicted of crime in the United Kingdom, with their particulars and their photographs, for the better identification of criminals, while it

was made lawful for the courts to subject those convicted a second time to penal servitude to police supervision for seven years after the expiration of their sentence. The British penal system became very strict indeed! But how did it operate in practice in reference to police supervision after release?

The Commissioners reporting in 1879 found it very difficult to determine 'how far the present arrangements for supervision have produced good results'²²⁰. Although in the provincial towns and the country it seemed that the supervision had been more effective, in the metropolitan district which was receiving the great bulk of discharged offenders 'the system had never a fair trial'²²¹. Those who believed that at last the English system became as repressive as the Irish system disappointingly learned in 1878 that 'at present the clause in the Act with regard to men reporting themselves is almost a dead letter' in the metropolitan district of London²²². If the system was 'a stern reality' in the colonies, here it was 'little more than what you may call a civil disability', witnessed the Chief Commissioner of Police. He further reported that in the years 1874-8 there had been 4,316 convicts discharged in London, and out of that number 987 in all had not reported to the police. The more serious criminals who most required to be constantly watched risked not reporting and therefore evaded supervision altogether. As before 1864 police had considered it illegal to have individuals released on ticket of leave without an Act of Parliament as

220. Report, 1879, para. 90.

221. Ibid.

222. See evid. of the Chief. Comm. of Pol. (4444-5), ibid.

something unheard in this country before²²³, and they were directed not to notice the ticket holders although they could notice and 'point out' the old convicts²²⁴, so in 1879 a 'legal defect' in the Act of 1871 made reporting to the metropolitan police unenforced²²⁵. Once more the Comm. of 1879 suggested as 'the best remedy' for the metropolis the employment of special police officers in plain clothes to work 'in the spirit of the late Mr. Organ'²²⁶, whereas Crofton himself recommended placing the evaders in the 'Hue and Cry' as in Ireland.

There was another instance of penal practice which had remained peculiarly Irish for a whole quarter of a century: the intermediate prison. Lord Naas had proposed to the Comm. of 1863 the introduction of this institution in England but the proposal was defeated by a majority of one only. After sixteen years the Commission of 1879 admitted that 'the favourable experience of this system extends now over many years' and therefore it appeared to them 'deserving of consideration' whether it might not be advantageous to create 'an establishment on the intermediate principle' for first offenders²²⁷.

One might say then that although the English penal system was never assimilated with the Irish, nonetheless it itself became more and more oppressive to the point that our interpretation

223. Evid. Waddington to the Comm. 1863, 430ff and Mayne, 1631-2.

224. Evid. Mayne, 1625, ibid.

225. The Act provided report to the Comm. of Police or 'to whom the Comm. of Pol. may nominate'. Since officers changed continuously enforcement was impossible. The act should be amended to provide reporting to the officer on duty at the police station.

226. Op.cit., p.xxxv.

227. Ibid.

in this chapter is that the repressiveness of the latter system was mainly due to the colonial status of Ireland is challenged to some extent. However, our analysis of the Irish system and its comparison with the English penal system demonstrated that, although both systems were contemporary and based upon identical legal foundations, they differed fundamentally in practice, so that repression in the English penal system to an extent almost equal to that of the Irish convict system came much later.

C h a p t e r 5

EARLY RELEASE ON LICENCE:

THE AMERICAN EXPERIENCE

Introduction

In this chapter we shall examine early release on licence (parole) as a method of penal practice in late nineteenth century America. Parole, along with the indeterminate sentence, developed there as an ideological product of the 'reformatory' movement' that emerged in the last decades of the century (1865 - 1900) after the end of the Civil War. It came about as a logical and predictable adjunct to the new 'reformatory' penal policy which was firstly implemented in Elmira in 1876, and whose basic tenets were that 'individual deficiency' constituted the main and primary source of criminality and that, therefore, the problem of crime could be solved only through remedial action at the level of personal transformation. In contrast to the Irish ideologues who became the apologists of the existing Irish convict system without a coherent theoretical basis, the American penal reformers of the post-Civil War period formulated a more or less consistent 'theory' of crime causation, penal treatment, the role of the criminal justice system, and the role of the State, which was at the basis a 'conservative' ideology functioning within the contours of industrial capitalism. The analysis of the basic elements of the reformatory movement, as they are found in the various works of its main representatives, will be supplied by a description and analysis of the first reformatory institution in Elmira, with special emphasis on the system of early conditional release, in the form of parole. Both theory and practice of the reformatory movement will be linked to the wider context of social and economic conditions as they developed in the post-war period.

The basic elements of the new reformatories, like marks, grades, indefinite sentence, early release on licence and others, were not 'invented' by the penal theorists of the time. As we have already seen, they existed in that form or another, in a more or less systematic way, in the Irish convict system and, much earlier, in Australia. What was new and original in the case of the reformatory movement, was the fact that all these various elements were formed into a systematic and integrated whole, based on a rigorous and coherent theoretical foundation which was largely in tune with broader sociological approaches starting from an essential acceptance of the then existing system of capitalist economic relations. The reformatory movement as a whole arose in a specific historical juncture of the American society, and it is this 'specificity' which allows for a separate examination of the American experience of parole. The fact that the reformatory elements were not discovered originally by the penal reformers of the post-war period is evident in the case of the houses of refuge, which had developed in the 1820s as juvenile institutions and included in a rudimentary fashion most of the later reformatory 'devices', like a system of marks, indefinite sentence and early release on licence in the form of indenture. The houses of refuge belong to another historical juncture and constitute ideological products of an earlier penal reform movement which led to, what has been called, 'the discovery of the asylum' as a way of solving social problems like crime, pauperism, insanity and juvenile delinquency. In this chapter we shall examine, then, this type of early release on licence

as well, along with the houses of refuge, their ideological foundation, and their function in Jacksonian society.

We have suggested elsewhere¹ that not only the use but also the avoidance of specific punishments is important analytically in indicating in a 'negative' way how specific types of punishment are related to particular social, economic and ideological contexts. That, in other words, a 'favourable climate' is a necessary prerequisite for the introduction of a new penal measure. This is exemplified in the case of the American penitentiaries which, although contemporary to the houses of refuge, did not develop a system of early release on licence. This must be attributed to two basic principles underlying their nature and function: the idea of equivalence between crime and punishment reflected in the imposed sentence and the idea of removal of the criminal away from the corrupting influences and temptations of the society, reflected in the absolute 'abstraction' of the criminal from the society, that the early penitentiaries implied. Eventually, for administrative reasons and reasons of political expediency both these principles were evaded through 'good-time' remissions and pardons, devices, however, that did not constitute methods of early release on licence, for they lacked revocability and supervision after release.

In the following chapter, therefore, we are going to

1. See the theoretical discussion in Chapter 2 above. Rusche & Kirchheimer have suggested that before the introduction of particular new penalties 'society must be in a position to incorporate them as integrated parts of the whole social and economic system'. They have also suggested that 'it is thus necessary to investigate the origin and fate of penal systems, the use or avoidance of specific punishments' Rusche & Kirchheimer, op.cit., pp.5-6.

examine in chronological order such outstanding developments in American penal history as penitentiaries, houses of refuge, and reformatories, the types of early release on licence linked with them, as well as the basic tenets and the social infrastructure of the ideological penal reform movements which gave rise to them in the 1820s and 1860s respectively.

The Early Penitentiaries

Introduction

The early penitentiaries and the houses of refuge, along with other numerous institutions for the underprivileged, the poor, the insane and all 'problematic' populations, emerged in the first decades of the nineteenth century as ideological products of an early penal reform movement². This movement, which led to what Rothman has called 'the discovery of the asylum' was based on the premise that it was essentially the 'social environment' which was at the root of every social problem, and that, therefore, the removal of all such populations from the corruptions and temptations of the society to artificial and contrived settings was a fundamental prerequisite for the elimination of social problems. These early reformers believed in the potential reclaimability of all human beings through proper moral instruction, and rejected the notion of the 'inherent depravity' of the sinners which dominated the minds of their forefathers in the Colonial

2. For the history of the evolution of American prisons, see O.F. Lewis, The Development of American Prisons and Prison Customs, 1776-1845, Albany, 1922, B. McKelvey, American Prisons, Chicago, 1936 (repr. 1968), W.D. Lewis, From Newgate to Dannemora; The Rise of the Penitentiary in New York, 1796-1848, Ithaca, N. York, 1965. For an excellent analysis of the penal reform movement of the 1820s which led to 'incarceration' as the main method of dealing with 'problem' populations, see D.J. Rothman, The Discovery of the Asylum, Boston, 1971.

period. In this section we shall examine the historical background, the types, and the function of American penitentiaries, while in the following section we shall examine in some detail the houses of refuge.

The Post-Revolution Era (1776-1820)

The decades following the War of Independence saw a deep transformation in the social, economic, political and cultural conditions of the various states. The former colonies had acquired their political sovereignty as independent states, the population of the nation had increased at a fast rate, the cities had become more dense and centres of some manufacture, while new ideas, mainly inspired by the Enlightenment, pushed aside prevailing Puritan doctrines and helped secularise the thought of the new Republic. The revolution against the coloniser did not restrict itself to the political field, but had a strong impact on all aspects of life of the newly liberated Americans. It encouraged them to question inherited practices and ideologies and to find new ones. A nation which rebelled against a monarchic metropolis accepted without hesitation that the previous laws were residues of barbarity and tried to devise new ones less brutal and more democratic. It is not surprising then that the first generation of Americans turned all their attention to changing the colonial criminal codes which they considered as the primary source of criminality.

It was Cesare Beccaria who wrote that 'the severity of punishment of itself emboldens men to commit the very wrongs it is supposed to prevent'³. The certainty of the punishment

3. C. Beccaria, On Crimes and Punishments, 1769 (trans. by H. Paolucci), Indian, 1963, p.43.

and not its severity was, for Beccaria, the most important desideratum. This notion suited the revolutionary ideals of the Americans and their hate for everything British which appeared to them as archaic and cruel⁴. An early penal reformer suggested that the criminal code of the state had to be changed, because it consisted of laws of 'barbarous usages, corrupt society and monarchical principles'⁵, while another reformer in Philadelphia suggested in a pamphlet in 1793 that the new nation was an ideal place for the realisation of Beccaria's ideas⁶. Frequent references were made to the demands of reason, and more rational techniques of social and penal control were envisaged. The new codes which had been enacted by 1800 greatly diminished the importance of capital punishment as a way of dealing with convicts, and proposed instead incarceration of the offender in special institutions due to be built as soon as possible. In 1790 the famous Walnut Street prison, which had been used as a place of confinement of prisoners of war, was turned into the first state prison, while other penal institutions followed suit⁷.

From the point of view of the reformers the new penal institutions were more rational methods of punishment. They

4. It is interesting at this point to note that when William Penn attempted to introduce a more humane legislation in the province which took his name early in 1682, the colonial government did not allow it. As Thomas Eddy complained 'the mild voice of reason and humanity reached not the thrones of princes or the halls of legislators', in T. Eddy, An Account of the State Prison or Penitentiary House in the City of New York, N. York, 1801, p.5.

5. T. Eddy, op.cit., p.9.

6. W. Bradford, An Enquiry How Far the Punishment of Death is necessary in Pennsylvania, Phil., 1793, p.43. For a recent review of the early reform efforts at abolishing or reducing capital punishment see D.B. Davis, The Movement to Abolish Capital Punishment in America, 1787-1861, American Histor. Review, 63, 1957, pp.23-46.

spared the lives of most convicts and, therefore, were more humane; they were also less cruel and shameful than corporal punishments. Finally, imprisonment was a type of punishment in which the principle of proportion between crime and penalty, praised by the classical penal philosophers like Beccaria, could be implemented through extension or shortening of the imposed term, as the case might be. To be sure, the prisons per se were of little interest or importance to the reformers, because they saw prisons as 'necessary adjuncts to the reform, the substitutes of capital punishment'⁸, not as independent entities worthy of examination and study.

The First State Prisons

It is usual for traditional penal historians to share in the enthusiasm of the early reformers and to attribute to 'disinterested' humanitarians any change in penal practice which looks more 'progressive' than the previously existing. Francis Lieber writing in the last century characterised the American penitentiaries as 'a new victory of mind over matter' and as 'monuments of a charitable disposition of the honest members of society towards their fallen and unfortunate brethren'⁹. A recent historian pointed out, in the same vein, that 'the original inspiration of the penitentiary was rationalistic, but the successful establishment of prisons and the determination

7. Newgate, 1796, N. Jersey, 1797, Virginia, Kentucky, 1800 and later, others.

8. D. Rothman, op.cit., p. 62.

9. Fr. Lieber, Preface to Beaumont & Tocqueville, On the Penitentiary System in the United States, Phil., 1833, p.6.

of their early character were more directly influenced by the reviving religious idealism of the early nineteenth century'¹⁰. Yet, 'humanitarianism' or 'religious idealism' do not function in a social vacuum, but reflect more basic material realities and purposes that are usually either ignored or mystified under an idealist rhetoric.

Thus, when a society was established in Philadelphia in 1787 under the name of Society for Alleviating the Miseries of Public Prisons, the preamble of its constitution put great emphasis on, 'the obligations of benevolence which are founded on the precepts and example of the Author of Christianity' towards 'our fellow creatures', and suggested that, 'by the aids of humanity their undue and illegal suffering may be prevented'¹¹. This Society is widely considered as instrumental for the establishment of Walnut Street prison, 'under solitary confinement to hard labour and a total abstinence from spirituous liquors'¹². Ample historical evidence indicates, however, that other forces apart from the 'obligations of benevolence' spearheaded concern for some kind of reform¹³. The penal code of 1786, which greatly mitigated the severity of punishments and abolished the death penalty for almost every type of crime, introduced hard public labour in the streets of Philadelphia. According to Lownes¹⁴, a contemporary observer,

10. B. McKelvey, op.cit., p.2.

11. For the history of this society and the early prisons in Philadelphia, see H. Barnes, The Evolution of Penology in Pennsylvania, 1927 (repr. 1968), quotation from p.82.

12. Ibid, p.90.

13. See particularly P. Takagi, The Walnut Street Jail, in Federal Probation, 34, 1975, pp.18-26

the heads of the convicts had been shaved, they wore peculiar dress and were secured by iron chains and collars. Thus shackled they were turned into the streets of the city, 'under the eyes of the keepers armed with swords, blunderbusses and other weapons of destruction..'. But, even under the threat of so many weapons of destruction the convicts 'conducted themselves so riotously as to render it dangerous for the public to approach them'. Fighting among the prisoners was common and attacks upon the guards by sympathetic relatives and friends not infrequent. Moreover:

The disorders in society, the robberies, burglaries, breaches of prison, alarms in town and country, the drunkenness, profanity and indecencies of the prisoners in the streets must be in the memories of most. With these disorders the number of the criminals increased to such a degree as to alarm the community with fears that it would be impossible to find a place either large or strong enough to hold them..

Therefore, the prisoners in the streets constituted a double danger for the social order, according to Lownes. They constituted a menace to the public order of the city by disturbing the peace of everyday life and obstructing the task of their keepers, as well as a danger to the moral order of the community by their profane and indecent behaviour. The same author further reports that such a situation was disturbing in various other respects:

The old and hardened offender was daily in the practice of begging and insulting the inhabitants, collecting crowds of idle boys and holding with them the most indecent and improper conversation. Thus disgracefully treated and heated with liquour the prisoners meditated and executed plans of escape...

14. C. Lownes, An Account of the Alteration and Present State of the Penal Laws of Pennsylvania, Boston, 1793.

As it comes out from this contemporary description, the prisoners in the streets were a moral and social threat that had to be removed from the middle of the community and put somewhere else, out of sight and out of mind. The prisons, therefore, were constructed not from motives of 'humanity' but as mechanisms of penal control and places of detention for the secure custody of troublesome and immoral criminals. The purpose of the Society's proposal for 'solitary confinement' was to take out of the public view the misery and degradation heaped upon a section of the 'dangerous' classes.¹⁵

Neither was humanitarianism alone behind the policy of making the criminal codes less cruel by abolishing the death penalty for a great number of offences and substituting imprisonment and a milder scale of corporal punishments for it. The early reformers had realised that the Draconian laws were self-defeating, because the judges and juries preferred to acquit offenders about whose guilt they had not been totally convinced, rather than send them to the gallows.

As in the case of England¹⁶, a more 'humane' penal system would guarantee a more efficient functioning of the penal process. The preamble to an Act of 1798 in Virginia¹⁷ clearly shows the official awareness of this side-effect of the very severe laws:

15. For a similar point see P. Takagi, loc. cit., p.23.

16. See for example L. Radzinowicz, A History of English Criminal Law, 4 vols., 1948-68, Vol.I, pp.25-28, 83-91 and 97-103 for the reaction of the bench to the increasing number of capital offences. See also Douglas Hay, Property, Authority and the Criminal Law, in Hay et al, Albion's Fatal Tree, London 1975, pp.17-63. See also our discussion above, (chapter 3).

17. Reprinted in W. Crawford, Report on the Penitentiaries of the United States, London, 1835, Appendix p.114.

... experience in all ages and countries has shown that cruel and sanguinary laws defeat their own purpose by engaging the benevolence of mankind to withhold prosecutions, to smother testimony and to listen to it with bias and by producing in many instances a total dispensation and impunity...

The 'Discovery' of the Penitentiary

This was an era (1776-1820) when the legal system constituted the centre of the interest of the first generation of American penologists. But, by the 1820s this interest gradually faded away as the crime volume had not decreased at all, even after the enactment of new, more rational and less cruel penal codes. It was the failure of their ancestors to remedy the crime problem which led the second generation of American penologists and penal administrators to seek the roots of criminal behaviour elsewhere. Now attention shifted to the individual criminal, his family background, his upbringing, his affiliations and companions in society and the like. The conclusion was reached that the deeper roots of deviance were found in early childhood and in the family conditions in which the deviant had lived his youth¹⁸. However, crime was not inherent in human nature and there always remained the possibility of reform, if the breeding grounds of crime could be eliminated or properly manipulated. One solution, among those proposed, was to dry up 'the fountains of crime' such as

18. Family disorganisation and community corruption were widely regarded as origins of crime. The first category included 'orphanage', 'lack of parental restraint and example', 'early parental neglect', 'want of early parental instruction', 'bad parental example', 'failure of family training' and others. The second category usually referred to the 'multiple and multiplying temptations to crime', to taverns, theatres, gambling houses, brothels, etc. See Rothman, op.cit., pp.62-78.

disorganised families, taverns, brothels, etc. An alternative solution was perhaps easier to implement, although somewhat costly: 'to construct a special setting for the deviant. Remove him from the family and community and place him in an artificially created and therefore corruption free environment. Here he could learn all the vital lessons that others had ignored, while protected from the temptations of vice. A model and small-scale society could solve the immediate problem and point the way to broader reforms',¹⁹. The particular conceptualisation of the causes of criminal behaviour by the American penal reformers led directly to the discovery of the penitentiary as a solution. The aim of this institution then was to eliminate all external temptations of the corrupt society through the removal and absolute 'abstraction' of the criminal from society. Eventually, this 'abstraction' took two distinct forms and led to two rival and world famous systems of prison discipline: the Pennsylvania and the Auburn systems²⁰.

The Pennsylvania and Auburn Systems

The Pennsylvania type of prison was based upon the principle of absolute isolation of each convict in a separate cell day and night with no communication between the inmates or their guardians and with no relation of whatever kind with the outside

19. Ibid, p.71.

20. Detailed descriptions and criticisms of both 'models' of penitentiary can be found in many contemporary reports, in particular Beaumont & Tocqueville, op.cit., and W. Crawford, op.cit., also in Rusche & Kirchheimer, op.cit. and Kai Erikson, Wayward Puritans, N. York, 1966, esp. pp.199-205, where some interesting comments on the religious and psychological underpinnings of the two models. See also, Fr. Wines, Punishment and Reformation, 1895, pp.132 -161.

world. Since the main cause of criminality was supposedly found in the vicious social environment, the absolute removal of the prisoner from any contaminating influence and temptation was a necessary prerequisite for his reformation. It was believed that by being alone, the inmate would have plenty of time to think about his criminal life, to repent, and to be regenerated as a good Christian. This type of solitary confinement, without any work and with much Bible reading echoed Quakerian doctrines about the 'inner light' of man and the ability of every individual to receive the divine grace and salvation.

The advantages of this system, according to its proponents, were important. It excluded all bad contaminating influences from fellow prisoners or friends outside, was easy to manage and did not impose cruel corporal punishments in order to maintain prison discipline. In their view, the regime was secure, quiet, humane, well-ordered and worked for the moral reformation of the inmates.

The Auburn type of prison was based on the principle of isolation in separate cells during the night and congregate labour under absolute silence during the day, a principle which, according to Kai Erikson, 'mirrored the Puritan conviction that a reprobate spirit must be broken to the routines of a useful life because it cannot be truly redeemed',²¹. The isolation at night and the deadly silence during the day had an effect similar to that of the rival, but at least some

21. Kai Erikson, op.cit., p.202.

degree of communication was allowed through congregate labour in the workshops and common dinners in the dining-room. Discipline was very difficult to maintain and various mechanisms were utilised to keep order (masks, downcast eyes, lockstep, etc.) apart from the wide use of the whip.

Neither was the Auburn system without significant advantages, according to its supporters. It promoted the reformation of the convicts by preventing, through separation or silence, any communication with corrupting influences, it was not harmful to their health by allowing them to go out of their cells and to work or dine together, and, above all, it was less expensive to construct and less costly to run. Within their first years of operation some prisons of this model were able even to report that their inmates were engaged in a profitable enterprise²².

It is true that later constructions based on the Pennsylvania model provided some kind of work to each prisoner individually and in his separate cell in order both to keep him busy and to reduce the costs of prison management by the products of his labour; yet work under these conditions never became remunerative in an era when individual handicraft and manufacturing was put aside by the introduction of machines and collectivisation of work. It seems that it was the ability of the Auburn system to more productively exploit the convict labour and thus diminish the costs of prison upkeep that led

22. Beaumont & Toqueville, op.cit., esp. Ch.4. It seems, however, that at least at the beginning the prisons were not 'profitable' (taken into account the high expenditure for construction), but simply self-supporting.

to the widespread proliferation of penitentiaries based on the principle of congregate labour. It is of interest to note here that the Pennsylvania system was nowhere imitated outside Pennsylvania. However, it was easily adopted by many states in Europe and established itself as the main method of prison organisation. But, as Rushe and Kirchheimer observed, solitary confinement in Europe was introduced in order to inspire fear and intimidate the lower classes, because the existence of an industrial reserve army there did not make it necessary to exploit convict labour²³. It is characteristic that in America, where there was a permanent scarcity of labour at that period, merely punitive labour, as the crank, the treadwheel and the like, was never introduced on a systematic basis.

Auburn prison from its early years developed with great success the contract system of organising its prison labour, under which a manufacturer contracted with the state the output of the prison work paying the state for every working day of each prisoner. He had the authority to provide the raw material and the tools of the work, as well as to supervise the workshops and sell the goods, without authority on any matter of prison administration. This method of exploiting convict labour, in spite of many abuses by the capitalist manufacturers, worked smoothly for many years and came to an end only when the protests of the free labour and competing businessmen outside were so strong as not to go unnoticed. Even in the closing years of the nineteenth century some prisons were still very reluctant to abandon completely this method of labour.

23. Rushe & Kirchheimer, op.cit., p.132ff.

Meanwhile, other systems of exploitation had been devised, as the piece-price system, the lease system and the State-account system. As with the other systems it was again the combined pressure of free labourers and competing colleagues that made the abolition of these practices possible.²⁴

Thus, separation and labour were the two pillars upon which the penitentiary idea was based. The implementation of these two elements was possible through a well devised variety of control mechanisms, architectural design and a hard code of discipline. All the world of the prisoner, the time and place around him, were so constructed as to subdue him to the condition of a helpless and dependent encaged animal. The Pennsylvania model suffocated any physical and mental manifestation of human vitality within four walls day and night for long periods of confinement²⁵, while the Auburn system made necessary the introduction of as many means of corporal punishment as those it was intended to replace. Both systems were designed to crush the will of the inmates through harsh discipline in artificially contrived settings; both systems intended to enforce upon them total obedience as the best prerequisite of life, not only inside the prison walls but, more importantly, outside. It was generally believed that the experiments

24. For an examination of these systems, see B. McKelvey, op.cit.

25. As Beaumont & Tocqueville observed 'this absolute solitude if nothing interrupts it is beyond the strength of men; it destroys the criminal without intermission and without pity, it does not reform, it kills', op.cit., p.40. Ch. Dickens, who visited the prison wrote that 'this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body' American Notes, Scribner's Ed., New York, 1926, pp.305-306. Crawford, however, reported that he had 'no hesitation in declaring my conviction that its discipline is a safe and efficacious mode of prison management; that it has no unfavourable effect upon the mind or health', op.cit., p.14.

carried out in prisons had wider implications and could eventually be used for the better organisation of other institutions in the 'free' society. The results could benefit other penal institutions, and 'would greatly promote order, seriousness, and purity in large families, male and female boarding schools and colleges'²⁶. Even the whole society should be modelled after the penitentiaries, declared the chaplain at the Ohio penitentiary²⁷, and this was symptomatic of the grandiose ambitions set upon these penal institutions.

Yet, penitentiaries were not solely models for 'social reconstruction' or 'laboratories for social improvement' or schools of respect for order and authority. They were primarily warehouses for the underprivileged lower social strata and lion's dens for those endangering the existing social order. The failure of the system during the years to fulfil its promises did not raise outcries and protests of the people outside. They were apparently content that, although not rehabilitative, at least they securely held their inmates. The composition of the prison population was everywhere the same: labourers and workers. Fully half of the prisoners in Sing-Sing in 1853 were ordinary labourers. Almost 60% at Clinton prison in 1849, 60% of those in the New Jersey institution, 52% in Maryland and 42% in Ohio were unskilled

26. Boston Prison Discipline Society, Fourth Annual Report, Boston, 1829, pp.55-61.

27. 'Could we all be put on prison fare, for the space of two or three generations, the world would ultimately be better for it. Indeed, should society change places with the prisoners, so far as habits are concerned...' all would be got better. J.B. Finley, Memorials of Prison Life, Ohio, 1851, p.41, quoted by Rothman, op.cit., p.84.

workers. Almost all the remaining in these institutions were bordering on the semi-skilled, for example, blacksmiths, carpenters and so on. There was almost none of middle or upper class occupation²⁸.

Apart from being lower class the prison population was also immigrant, especially in the later years when immigration, mainly Irish immigration, became an integral part of American life. By the outbreak of Civil War only 44% of the prison population in New York were New Yorkers and the same was true for Massachusetts. In the other States immigrants constituted a large majority of the prison input. The last statement does not refer, of course, to the Southern Plantation States, because there the overwhelming majority or the totality of the prison population consisted of Negroes who, under the prevailing lease system in outdoor works, were organised in chain gangs and continued the slave tradition at another level²⁹.

The social and ethnic composition not only of the penitentiaries, but of all other institutions, like poorhouses, lunatic asylums and juvenile houses, which spread out in great quantities in the 1820s and the following years, constitutes an index of the extent to which 'the discovery of the asylum' was forced upon the dominant classes by the need to control the ever-increasing army of poor, insane, dependent, neglected and deviant in the lower strata of a fluid and unstable

28. Rothman, from whom these statistics are obtained, found that less than three per cent of all commitments could be classed as members of the upper class, op.cit., p.253.

29. For a vivid description of the condition of the convicts in the Southern States, see McKelvey, op.cit., pp.172-189.

society struggling for a new social order. As D.J. Rothman suggests:

The response in the Jacksonian period to the deviant and the dependent was first and foremost a vigorous attempt to promote the stability of the society at a moment when traditional ideas and practices appeared outmoded, constricted and ineffective. The almshouse and the orphan asylum, the penitentiary, the reformatory and the insane asylum all represented an effort to insure the cohesion of the community in new and changing circumstances³⁰.

After the fading away of the first enthusiastic optimism and the abandonment by the prison administrators of any pretence at reformation, prisons began to be seen at best as smoothly working factories, at worst as secure places for the custody of undesirables.

The Penitentiary and the Absence of Parole

As we have already noted, the 'invention' of penitentiaries was justified by its proponents as a result of the necessity to remove criminals from the temptations and evil influences of a corrupt and vicious society and separate them from any contaminating agency, in order to make them better citizens through penitence, repentance, discipline and habits of labour. This assumption, combined with an unremitted optimism in the beneficial effects of such an institution, implied that the longer the prisoner was cut off from the society the better. On the other hand, the function of the penitentiaries as manufacturing centres from the beginning led to the imposition of longer sentences of imprisonment 'not in reference to the

30. Rothman, op.cit., p.xviii

degree of punishment due to specific crimes, but with a view to pecuniary results,³¹. These premises upon which the system functioned rendered any scheme of early release undesirable. Other considerations, however, and particularly the need to maintain prison discipline by rewarding good behaviour and industriousness on behalf of meritorious convicts gave rise to 'good time' allowances, under which part of the sentence was not served and the prisoner was given an earlier release. Such a law was enacted as early as 1817 in New York and permitted shortening by one-fourth of all sentences of more than five years for good conduct. Similar legislation was enacted in Connecticut in 1821, and Tennessee in 1833, but it was only after 1856 that other states made use of such a device. What is of interest in the case of New York is that responsible for the reduction were the prison inspectors, so that although the legislature provided the schedule for the 'good time' allowance, broad discretion was given to an administrative body to decide whether or not an individual case was entitled to this privilege, a practice reminiscent of later parole procedures.

Since all the penitentiaries were manufacturing enterprises, the prisoners working either in isolation or collectively, the main criterion for the granting of the allowance was the amount of work performed, measured by counting individual items of goods produced per day or week. It is evident that such laws constituted a powerful mechanism of increasing convict

31. W. Crawford, op.cit., p.24.

productivity, while at the same time the hope of an early release facilitated prison discipline. Meanwhile, as the prisoners were paid for the work performed, good time reductions were substituted for money wages³².

Apart from these laws, the traditional method of early release through pardons was used to an extent dependent on various considerations and on the idiosyncratic disposition of each governor³³. In Auburn prison from 1817 to 1833 out of a total of 2,215 commitments more than one-third (668) were released by pardon, while out of 79,945 persons convicted from 1791 to 1832 2,488 had been pardoned between the years 1787-1832³⁴. Many abuses were connected with the granting of pardons, and it seems that, generally speaking, only those with many and powerful friends outside managed to get a pardon in return for political favours or other methods of briberies.

There were many penal theorists who, reflecting prevailing ideas of the period, were opposed to any kind of indulgence, of any description, because 'the best system of gaol management will be ineffectual, if its salutary terrors are to be impaired by such devices'³⁵. It was in accord with justice as well

32. See Rushe & Kirchheimer, *op.cit.*, p.131, B. Krisberg, Crime and Privilege, 1975, pp.158-9. Also an article by Th. Sellin, Commutation of Sentence, in Encyclopaedia of the Social Sciences, Vol.IV, pp.108-9.

33. See article, Pardon, in Encyclopaedia of the Social Sciences, Vol.XI p.570-572.

34. These numbers are given by Wm. Crawford, *op.cit.*, App. p.10. From a more careful study of Crawford's report it is certain that under the label 'pardon' all methods of early release were included. He frequently writes about 'pardons for good conduct' which are, of course, the 'good time' remissions. The basic difference, in one aspect, between pardon and remission is that the former wipes away guilt in the eyes of the law and consequently restores all civil right, while under the latter the convict is still a 'prisoner' out of the walls. See Sutherland & Cressey, Principles of Criminology, 1960, 6th ed, pp544-565 for a more detailed analysis of pardon and good time laws.

neither to mitigate nor to aggravate the penalties imposed by law. The conclusion was easily arrived at, that any such privilege was an injustice to the wider society. As Crawford argued:

To weaken the deterring influence of penal justice in order to reclaim, is to sacrifice the best interests of society at large for a few of the least worthy of its members³⁶.

The same authority considered the indiscreet remission of punishment by pardon as 'a direct incentive to crime'. Another European some ten years before had stated that 'everything that diminishes the certainty of punishment is an evil; every punishment which is not fixed, which floats between fear and hope is a punishment badly contrived'³⁷. Against the pardon, as it was administered in America, was also Francis Lieber, penal reformer and translator of the Report of Beaumont and Tocqueville on the Penitentiaries in America³⁸. All these opinions reflected the general ideological climate regarding the proper function of the penal institutions at the time which was hostile to the un-necessary interference with the imposed sentence. It seems that pragmatic reasons of party politics, prison discipline and better management of the penitentiaries were instrumental for the introduction of some administrative devices for remitting punishments. Needless to

35. W. Crawford, op.cit., p.40.

36. Ibid.

37. Dumont, in a report to the representative council of Geneva in 1825 in consequence of which a new law 'in the republic of Geneva' was enacted, quoted by Fr. Lieber, op.cit., p.31.

38. Lieber was in favour of the principle of pardon for exceptional cases, but strongly against its administration. Especially he demanded that the responsibility of pardoning ought to be vested 'in a body of men, not in an individual'. See his introduction to Beaumont & Tocqueville, op.cit., pp.29-30.

say, in an era of widespread prison construction like the 1820s and 1830s problems of overcrowding were out of question in the country; only in later years these types of early release were widely used as genuine means for reducing prison populations. Although not paroles in the proper sense, both good-time remissions and pardons played an important role in undermining the absolute authority of the judiciary in prescribing definite sentences of imprisonment and paved the way to increased administrative intervention which facilitated the introduction of early release on conditions in the form of parole³⁹.

The House of Refuge

Introduction

The house of refuge was a product of the same penal reform movement which led to the establishment of penitentiaries for adults and essentially similar to a later movement which led to the introduction of special juvenile courts at the end of the century. As in the case of penitentiaries and other custodial institutions of the 1820s and 30s, the ideological justification of the house of refuge was determined by the moderate 'environmentalism' of the prevailing theories on the sources of crime, which sought the solution of the problem of juvenile delinquency in the abstraction of problematic youths from the temptations of the society, and their sheltering in a specially contrived setting. This setting was considered appropriate for instruction and character development, and implemented a system of discipline which was based on indeterminate

39. We mean parole in the various prisons, and not the reformatories where parole was introduced as a logical corollary of the indeterminate 'reformatory' sentence.

confinement, grades and marks, a strictly organised daily routine, and the possibility of early release on licence in the form of indenture, a practice which antedated parole at the Elmira Reformatory for almost half a century⁴⁰.

Historical Background

The house of refuge constituted an instance of the broader reform movement which led to the 'discovery of the asylum' as the main way of solving social problems. Of course, incarceration of juveniles was not something new, for prisons, penitentiaries, almshouses and workhouses had been long receiving and herding them together with adults. What was new, was the realisation of the need, and the actual implementation of the idea, for a separate institution for juveniles. Many penal reformers of the period lamented the indiscriminatory mixture of all criminals that facilitated the passing of criminal tricks and habits from old, hardened prisoners to inexperienced novices, in prisons 'which in many instances proved a school for the completion of the most adept characters of villainy'. In the view of the reformers, it was their interest in the separation of juveniles from adult prisoners, coupled with the necessity of removing them from the corrupt environment which led directly to the foundation of the house of refuge.

The first manifestation of this concern with the fate of problematic children happened in the city of New York where,

40. For the history of the house of refuge, see B.K. Pierce, A Half-Century with Juvenile Delinquents: The New York House of Refuge and its Times, Appleton, N. York, 1869, and an earlier work by E. Devoe, The Refuge System, N. York, 1848. More recent studies include N.K. Teeters, The Early Days of the Philadelphia House of Refuge, Pennsylvania History, 27, 1960, pp.165-187, R.S. Pickett, House of Refuge, Syracuse, 1969.

in 1817 a society was formed under the leadership of an eminent educator, John Griscom, consisting mainly of merchants, educators, church officials and other members of the upper classes, and called 'Society for the Prevention of Pauperism',⁴¹. The purpose of the society was to 'consider some practical measures for the cure of pauperism and the elimination of crime',⁴². Some years later the society was given another name - Society for the Reformation of Juvenile Delinquents - and dedicated itself exclusively to the study of the problems of young delinquents. In their second report for the year 1819 the city penitentiary at Bellevue was characterised as 'one great school of vice and desperation',⁴³. While two years later recommending the erection of a building for the separate confinement of juveniles they emphasised that such an institution should be a 'school of instruction' rather than a place of punishment 'like our present state prisons',⁴⁴. At approximately the same time in Philadelphia a similar society for alleviating the miseries of public prisons showed the same concern with the fate of children herded in common prisons and inured to 'vice in its most formidable shape',⁴⁵.

The programmes of both societies proposed two particular directions for action. First, separation of young offenders

41. For a general history of charities and corrections in the State of New York see D.M. Schneider, The History of Public Welfare in New York State, Vol.I, 1609-1866, Chicago, 1938, where, however, facts without interpretation are presented. John Griscom was an earnest disciple of the famous pedagogue Pestalozzi, and he toured Europe for four whole years studying the educational and penal establishments of these countries; the house of refuge is attributed to his initiative, but it was rather an introduction from Europe than an 'invention'. W. Crawford rather chauvinistically attempts to attribute to a London institution the honour of pioneer, op.cit., p.45 (a long footnote); yet, almost 100 years before an August H. Francke in the city of Halle in Germany had founded a similar institution for delinquent, destitute and neglected children. The search for 'origins' is really futile... See N.K. Teeters, The Challenge of Delinquency, N.York, Prentice-Hall Inc., 1950, p.56.

from the contaminating influences of the adults in the various gaols and penitentiaries, and confinement of such persons in special institutions; second, a different form of penal treatment for the young offenders with great emphasis on instruction and reformation, not punishment. The first houses of refuge, which were erected under the aegis of the said Societies, promised to implement these new objectives. One assumption underlying the general movement was that the immaturity of young persons, and therefore their diminished responsibility, called for specific remedies. Moreover, although the youngsters were more vulnerable to corruption they were also more changeable in character and largely amenable to good habits, facts that made possible a more flexible approach to the problem of juvenile delinquency. On the other hand, dealing with the problem of crime at that stage was regarded as nipping the social evil in the bud and raised the imagination of the reformers to the possibility of a future crime-free society. Needless to say that the house of refuge, like so many institutions before, failed to fulfil the aspirations of its patrons and achieve the aims for which it

42. B.K. Pierce, op.cit., p.33.

43. Soc. Prev. of Paup., Second Annual Report, 1820, quoted in N.K. Teeters, op.cit., p. 430.

44. S.P.P., Fourth Annual Report, 1822, p.59, quoted ibid, p.431.

45. From the Minutes of the Acting Committee of the Pennsylvania Prison Society, 1824, quoted by Teeters, loc.cit, p.168. Another public meeting held in 1826 resolved that it was 'expedient and necessary' to establish a house of refuge in Philadelphia, because of the importance of 'rescuing those especially in their tender years who were confined in prisons, where association with accomplished and hardened offenders too often confirms their depraved dispositions and enlarges their knowledge of crime'. The establishment would be devoted to 'the safe keeping and moral improvement of the juvenile offenders', ibid, p.169.

had been founded.

As in the case of other penal reform crusades, it has been traditionally accepted that the house of refuge emerged as a result of humanitarian feelings of philanthropic men. The houses of refuge, according to Beaumont and Tocqueville, 'were called into existence by the combination of individual charity' and were established by men 'touched by the shocking fate of young delinquents who were indiscriminately confounded in the prisons with inveterate criminals',⁴⁶. Another foreigner admirer of the institution appraised it as a lasting tribute 'to the wisdom and humanity of the time',⁴⁷. However, the humanitarianism of some individuals notwithstanding, the movement for the erection of the houses of refuge arose primarily from a concern of the dominant classes with the real threat which an increased army of idle, dissolute, wandering youngsters, mostly immigrants or of immigrant origin, posed to the public and social order. The situation had attained frightening proportions, especially in New York, a rapidly growing city of 120,000 and the gateway of America. The 'juvenile gangs along the waterfront' represented the growth of an undesirable element in the city's life. The Society for the Prevention of Pauperism was formed by well-to-do middle class persons in order to check the progress of this social evil which threatened 'the peace and safety of the community',⁴⁸. The house of refuge was intended for:

46. Beaumont & Tocqueville, op.cit., p.136.

47. Charles Lucas, quoted by Pickett. Governor Clinton of N. York regarded the houses of refuge as 'the best penitentiary establishments which have been conceived of by the genius of man, and instituted by his benevolence', in Beaumont & Tocqueville, op.cit., p.136.

48. Editorial in Evening Post, Dec.17, 1823.

...depraved youths of both sexes who are growing up in idleness and vice among us, and who by petty thefts and other evil practices are not only an injury to the city generally by depredating upon our property... but are contaminating all who come within the reach of their influence⁴⁹.

It was, therefore, not the compassion for the confined alone, but also the fear of the vagrant and the homeless who 'day and night infest our streets' as the Rev. J. Stanford, Chaplain of the New York house of correction, warned the officials as early as 1812. The same divine had made the important observation that, since the penal treatment of children and adults was similar, the judges frequently did not convict youngsters although convinced of their guilt. In his view:

...the erection of a juvenile reformatory would solve this problem and would entail the certain punishment of the young⁵⁰ ..

There was at the basis a fear that the impunity of young wrong doers would give them opportunities for further depredations and would encourage their delinquent way of life. We might conclude that to 'clean our streets of the numberless depraved boys and girls that now infest them'⁵¹ was the cardinal purpose for the foundation of the house of refuge. Yet, this purpose had been largely masked. The enterprise of 'rescuing' society from its undesirables was presented as a business of rescuing the children from the corruption and vice of society. The difference is not nominal, because on that lay the whole mystificatory process which was at work in the general movement for institutionalisation. The penal reformers of the period,

49. Stephen Allen in a letter to Senator Bowne, quoted by Pickett, op.cit., p.54.

50. Quoted by Schneider, op.cit., Vol.I, p.317ff.

51. New York Evening Post, March 23, 1824 (editorial)

having been sure that all sources of criminality were found in dissolved family ties and an immoral society had no serious difficulty in conceiving and interpreting their 'mission' as aiming at the removal of the children from, and their shielding against, the temptations of a bad society. In a report of the Boston asylum it was observed that:

There are two ways to aid in the redemption of society; one is to remove the sources of corruption; and the other to remove the young from the temptations that exist⁵².

The first alternative was never seriously considered by the child-savers and other penal reformers of the time, and there lies their essential 'conservatism'. Even the moderate 'environmentalism' of the asylum movement was mediated through the particular individual, thus avoiding any serious criticism of the social system as a whole. Instead of eliminating the social corruptions they proposed reformation of the individuals so that 'they be incorruptible'⁵³. As in the case of later reformatories the house of refuge ideology was founded upon the conservative notion of 'personalisation of the social evil' and the trick of, what has been called, 'blaming the victim'. The institution was portrayed as a welfare establishment primarily concerned with the interests of the particular individuals, and thus its claims to legitimation were highly

52. Boston Asylum and Farm School Report for 1845, Boston, 1845, p.14.

53. The purpose of the institution was to 'enable the boy to resist temptation wherever and whenever he finds it', to 'enlighten their minds and aid them in forming virtuous habits, that they may finally go forth, clothed as in invisible armour', House of Refuge Managers, Proceedings of the First Convention, N.York, 1857, p.49, Boston Asylum and Farm School, Report for 1839, Boston 1839, p.11. Many of these quotations are drawn from Rothman, op.cit. (passim).

advanced. The 'welfare' justification allowed the house of refuge to spread a wider net over the young population of the lower classes and blur the delineation between delinquent and merely depended juveniles, so that not only convicted offenders, but also vagrant, idle, neglected, abjected and orphan children were possible candidates for this institution⁵⁴. Moreover, since the house of refuge was not envisaged as a punitive institution in the tradition of 'retributivism' the notions of both guilt and equivalent exchange between crime and punishment were out of question for the penal reformers. The reception of juveniles for acts not strictly illegal meant that neither legal formalism nor guarantees of due-process were necessary. Under these circumstances the provision of early release on conditions had been more easily justified, but on the other hand the control of the state over a particular section of the lower and immigrant classes had been subtly extended without even the facade of legality⁵⁵.

The Institution and its Functions

The eliminating function of the house of refuge was evident in the external and internal arrangements of the institution and its everyday routine, which was hardly different from the regime of an adult penitentiary. The inmates were sleeping in separate cells, worked in silence for eight and a half hours

54. It must be noted, however, that some of the founders of the institution envisaged it as a proper establishment only for delinquent-convicted children.

55. For similar problems related to a later child-saving movement, see A. Platt, The Child Savers, Chicago, 1969. See also R.M. Mennel, Origins of the Juvenile Court, Crime & Delinquency, 18, 1972, pp. 68-78.

per day, were taught the three Rs for three and a half hours per day, and were allowed only half an hour a day for play and recreation. Their labour was contracted to outside manufacturers who provided the material, but had no contact with the children. Manual labour and moral instruction were, therefore, the main occupations of the children within the institution. A long, high wall surrounded the whole structure of stone and iron. To complete the authoritarian routine and enhance prison discipline wooden guns were supplied to the inmates for 'military' exercises and parading formations, with special badges, coloured uniforms, and ranks and files. In the Boston house of refuge a system of self-government was established by its superintendent, for he regarded his charges 'as citizens in a tiny republic', while in New York the inmates formulated their own juries to administer justice among themselves in minor issues⁵⁶.

The alleged goals of the house were, apart from 'sheltering' the inmates, their rehabilitation and reform. According to the penal administrators' philosophy reformation was possible only through a regular, strict and steady discipline. In a report of the New York house of refuge all concerned were advised: 'let inmates be made tractable and obedient...(through) a vigorous course of moral and corporal discipline'⁵⁷.

Discipline was maintained through various means of punishment

56. See generally Pickett, op.cit. (passim).

57. New York House of Refuge, Second Annual Report, N.York, 1827, p.83. 'Cheerful submission' and obedience to superiors was regarded by the reformers as a fundamentally educational experience, not only breaking the obstinacy of spirits, but also breeding feelings of order and respect to hierarchy.

and reward like gradings of behaviour, marks and badges, as well as through some punitive methods, like solitary confinement, reduced food rations and, above all, whipping. Neither was concern for discipline a matter for the penal institutions only. It dominated current pedagogy as well. According to the prevailing educational and child-rearing approaches and methods the primary virtue of life was the absolute obedience to rules and endless respect for authority⁵⁸. An administrator asserted that 'the most benevolent and humane method for the management of children is to require prompt and implicit obedience'⁵⁹. While an educator and child-rearing instructor outside, summarised that 'the first, the second and the third requisite in family government is obedience'⁶⁰. As D.J. Rothman rightly observes:

At the root of this popular insistence on the primacy of obedience was a conception of individual respect for authority as the cornerstone of an orderly society⁶¹.

Since obedience was to be shown because it was commanded and not because it was right or just, the consideration of obedience as the primary virtue of every social organisation made the house of refuge a medium of socialisation to the middle-class values of cheerful and spontaneous submission to the will of the superiors, and of respect for the existing hierarchical order of society. Some years later the managers were in a position to boast that 'idleness has been changed to industry,

58. For an analysis of these methods, see Rothman, op.cit., p.216ff.

59. N. York House of Refuge, First Annual Report, N.York, 1826, p.57.

60. Ann E. Porter, Uncle Jerry's Letters to Young Mothers, Boston 1854, p.49, quoted by Rothman, op.cit., p.218, where further references to contemporary educational opinions and techniques.

61. Ibid, p.220.

filth and rags to cleanliness and comfortable apparel, boisterous confidence to quick submission'⁶². Yet, the high rate of escapes pointed to the essential oppressiveness of the system and reinforced its bias for the secure custody of the inmates, thus increasingly demasking the ideological rhetoric and revealing the prison nature of the house of refuge⁶³.

There was, however, an essential difference between the penitentiary and the house of refuge in one crucial respect. Whereas in the former the discipline and management of the prison was under the superintendence of men usually coming from the military occupation, in the houses of refuge directorships were given to educators, medical professionals etc. It seems, however, that the practical results and the implementation of discipline were not different and many directors have been characterised as 'stern disciplinarians'. The life was repressive everywhere and the routine monotonous and regimented like a barrack. The whole system of discipline, therefore, tended to the mechanisation and not the rehabilitation of the inmates. The whole apparatus of the house of refuge defied the insistence of many child-savers that it should be organised as a family unit, or the promise of the crusaders that the house of refuge could provide all the family virtues, like affection, care and love, that the unfortunate children had not felt in their own homes. The obsession with security

62. R. Pickett, op.cit., p.77.

63. There were also cases of incipient riots and fire settings. In the first three years of the institution of Philadelphia at least three fires were set by the children. Cases of open defiance against the rules or the authority of teachers etc. were not uncommon.

meant ultimately that the houses of refuge despite the glowing language had become 'penitentiaries for juveniles'.

The admission policy of the houses of refuge was flexible and free from many formalities and typicalities. Since, according to their founders, whoever is detained in them undergoes as a rule no punishment, Beaumont & Tocqueville reported, for example, that 'the decision by which the children are sent to the refuge, has neither the solemnity nor the forms of a judgement'⁶⁴. Every constable and watchman in the city could spread his net to catch as many idle and vagrant children as possible. Even the parents themselves could send their children there in many cases. In that decision, matters of due process and protection of civil rights from possible abuses were not allowed to rise because all the enterprise aimed at the 'welfare' and the special interests of the child, at the salvation of the child in the brink of catastrophe, as we have seen⁶⁵. In this way, however, other 'superior' and more powerful groups defined and enforced their definitions about what was the 'welfare', the 'interest' and so on of another group, without the latter having any power to raise their voice. The movement 'reified the dependent status of children by disenfranchising them of legal rights' as Anthony Platt observed for a later child-saving movement⁶⁶.

64. Beaumont & Tocqueville, op.cit., p.139.

65. William Crawford, who usually is not so sensitive to such details, expresses his concern about that arrangement and writes: 'The principles of justice are immutable and ought not to be violated even in the person of a youth and that violation is the less defensible when the party is weak, destitute and unprotected'. op.cit., p.44.

66. A. Platt, op.cit.

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Deprived of their legal safeguards the youths were confronted with a peculiar characteristic of the house of refuge which was later to constitute a cornerstone in the reformatory movement of the 1860s: the indeterminate confinement. Those directed to the house of refuge were under the guardianship of the institution until they had reached their majority⁶⁷. Confinement during minority, however, had never been implemented in practice, as the inmates were released much earlier under a kind of conditional release which highly resembles the later parole system. Through the indeterminate confinement during minority the control of the institution over the inmate was extended even more, a fact which led many magistrates not to send juveniles to the houses of refuge for so long periods under control, but to the local gaols or penitentiaries where the term of confinement was generally known in advance. On the other hand, the magistrates considered the house of refuge as too lenient for some 'experienced' or tough juveniles. Finally, they wanted to determine themselves the exact length of the sentence and not leave this task to an administrative body, that was, after all, quasi-private.

It is necessary to note that the houses of refuge had been built through private initiative and private money and administered by a body of managers elected by and from a population of subscribers. This makes no difference, however, because the official state backed the whole mechanism of the house of refuge through grants, authorisation of the constitution

67. Which meant for the boys 21, for the girls 18 years of age.

of the house and, more importantly, endorsement of the goals and the policy of the institution as implementing its own aims and objectives. The state drew the boundaries within which it left to private managers a degree of administrative freedom. As we have argued elsewhere in a wider context⁶⁸ the way in which the repressive apparatus of the state is used depends to a large extent upon the existence and availability of such parallel apparatuses; then, a kind of assignment of authority from the government to the semi-private apparatus occurs for the attainment of a goal cherished by the state. A good illustration of the tremendous authority which the managers of the houses of refuge exercised under the eulogy of the state is their power to abrogate parental control, both nominal and legal, for all the period of minority of the inmates. The managers acting in loco parentis had absolute authority over all inmates until their majority⁶⁹. Even the family ties were severely affected through the minimisation of contact allowed between inmates and their relatives. The closer the relative, the more infrequent the permitted contact. So, while visits by foreigners were not prohibited at all,

68. See above Ch.2 (theoretical).

69. For an early legal battle, see the case of Ex parte Crouse. In 1838 a girl's father attempted to free her from the Phil. House of Refuge on a writ of habeas corpus. The Pennsylvania Supreme Court denied this claim and declared that 'the right of parental control is a natural but not an unalienable one'. The same decision defined the aim of the institution 'the object of the charity is reformation, by training the inmates to industry; by imbuing their minds with principles of morality and religion; by furnishing them with means to earn a living; and above all, by separating them from the corrupting influences of improper associates'. Ex parte Crouse 4 Whart.9 (Pa.1838)

visits by parents were allowed only once every three months; the assumption being that it was unsound to remove the children from indifferent or bad parents and afterwards allow such parents to come again near their offsprings and contaminate them. Within the frame of the moderate environmentalism of the reformers parental neglect was assumed as a certain preamble to a life of vice and crime, as we have already noted.

Early Release on Licence (Indenture)

In contrast to the penitentiaries, the houses of refuge - although themselves products of the same ideological movement towards 'incarceration' - developed a kind of early release on licence, in the form of indenture. It sounds somehow paradoxical that an institution placing such a great emphasis on the removal of the children from the temptations of society was prepared to release them before the expiration of their term back to the 'corrupting' outside world. The truth is that they were not just 'released' or let loose, but put under supervision that had the form of a contractual relationship; also, they were not freed to the outside corrupt world, meaning the industrialised city, but were 'assigned' to good families away from the cities or to ships on whale-hunting journeys, and they were always under the supervision of the house of refuge liable to be recalled to the institution for any misconduct until their majority. Early release on licence was more easily acceptable in the case of the houses of refuge, because of a willingness of the 'respectable classes' to receive the juveniles back in their midst as apprentices and forgo the temporary advantages of custody. The acceptance was highly

facilitated by the conception of the house of refuge population as less dangerous than common prisoners, especially after the salutary impact of the house of refuge discipline⁷⁰.

Eligible for early release on licence were those juveniles of the First Class that had already 'served' one year and shown signs of reformation. Considering the image of a 'reformed' child the penal administrators of the period held, one might say that the more submissive and subdued children, who had learned obedience and respect for 'authority because authority' were more likely to get early release. As we shall see, however, there was a possibility even for 'unreformed' and wayward children to go out earlier, for totally different reasons. The decision to grant or deny this type of parole was taken by an administrative body of the internal organisation of the institution. It consisted of five persons elected by ballot by the Board of Managers and it was called Indenturing Committee. This Committee examined not only the eligibility of the youngsters, but also applications of outside persons interested in employing them when released.

Special conditions were imposed by the Rules of the House relating to the suitability of the applicants to obtain inmates. Inmates were bound only to persons of good moral character, interested in the reformation of the children placed under their care. Some cases were prohibited in advance:

70. This was underpinned with the common idea that 'the inmate of a house of refuge does not undergo a punishment' and, therefore, 'as he has been sent to the house for his own interest only, he is allowed to leave it as soon as his interest requires it'. Beaumont & Tocqueville, op.cit., p.149.

No inmate shall be apprenticed to a tavern-keeper or distiller of spirituous liquors; and girls shall not be apprenticed to unmarried men, or placed in boarding houses or in public academies⁷¹...

Highly favourable applications were considered those made by farmers and other professionals residing outside the towns; the Rules of the house of Philadelphia explicitly demanded that 'no child shall be apprenticed to any person or persons residing in the city of Philadelphia or within twenty miles thereof' and that preference should be given to applications from persons not residing in towns 'but in the more distant parts of the country'⁷².

Problem children were indentured to sailing ships, particularly on whaling trips, in order both to reduce disciplinary troubles in the house and give them an opportunity to improve their obedience through the harsh life of a sea-boy. Other children who had learned a trade in the house were indentured to respective masters to improve their crafts. In 1833 in New York, from a total of 108 children indentured, 49 were 'assigned' to farmers, 19 to sea services, 10 to shoemakers and 30 to nineteen other trades. Generally, in the first ten years of operation of the institution out of a total of 1480 children (1148 boys and 360 girls) as many as 1148 (77 per cent) were indentured in one way or the other.

The responsibility of the house of refuge through its Managers and special committees over the inmates until majority continued after indenture, conditions imposed upon

71. Rules of the House of Refuge of Philadelphia, reproduced in Crawford, op.cit., App. p.152ff.

72. Ibid.

the released being generally those of indenture. They were mainly of a contractual nature giving rights and imposing duties upon both parts of the contract; for the child the conditions included good behaviour, work, good faith and many limitations of action. The historians have preserved the name and the covenant of the first child to be indentured. She was a girl of 13, called Diana William, and these were some of the conditions imposed upon her:

...her mistress faithfully to serve, her secrets keep, her lawful commands everywhere readily obey ... she shall not waste her mistress's goods nor lend unlawfully to any; she shall not commit fornication, nor contract matrimony within the said term; at cards, dice or any other unlawful game she shall not play ...nor haunt alehouses, taverns nor playhouses, but in all things behave herself⁷³.

Analogous conditions were imposed upon boys and indeed upon every young apprentice. In addition to indenture, 'farming out' of the children was sometimes used; it is recorded that eight boys were sent from New York to Ohio in 1828⁷⁴.

Supervision of the indentured ex-inmates was carried by the masters of the families or the employers or the captain of the ship they were working for, yet ultimate responsibility remained with the house, whose managers corresponded with the apprentice and endeavoured to 'keep him in the path of virtue' by their advice. In their turn, the youth wrote to the house 'and more than once the latter has received letters from young delinquents full of touching expressions of gratitude'⁷⁵.

73. Quoted in 'Diana signs the Covenant', Probation, April 1942, pp.105-10

74. At a later period the New York Aid Society shipped the city urchins to Western farms in wholesale lots to prevent philanthropists and local authorities from committing them to the refuge. See N.K. Teeters, op.cit., p439, 65ff, Mennel, Origins, loc.cit., p76

75. Beaumont & Tocqueville, op.cit., p.150.

Similar reports were sent by the master of the child in regard to his behaviour and improvement.

Every transgression of the conditions imposed, especially the child's escape from his master, resulted in the revocation of indenture and his return to the house as before. If the subsequent conduct of the child was promising nothing prevented a second, or third indenture. The general policy of the institution was not to confine the children for long periods, as evidence for the early years of the houses of refuge suggests. The average length of time served was no more than eighteen months, while the average age of commitment was only 12 years and the maximum of confinement the age of 21 or 18 for boys and girls respectively, as we have already seen⁷⁶. It is clear that there was a tendency on the part of the house administrators to release their charges very early indeed. It is of interest to examine some of the reasons behind this liberal policy of the house; an examination of the release procedures may illuminate the whole function of the institution as well, since conditional release under indenture was an integral part of the house of refuge and, one might venture to say, an end to which all the other practices of the house were directed.

In the case of troublesome prisoners, when the usual discipline measures were not enough, early conditional release was a crisis solution which got the house rid of the minority of the incorrigible and trouble-makers. These disruptive and

76. For the averages of this early period see Crawford, op.cit.p.42ff

disorderly persons were sent to such posts, as those where their chances for submission and obedience were a lot, while the dangers from their disorderly behaviour were minimal. It is evident that for them early release was a safety-valve which preserved the discipline and the well-ordered life of the establishment.

For the great majority of the unfortunate children their early release served a simple purpose: it left vacant room for the introduction of new recruits from the army of vagrant, neglected and dependent children. On the other hand, it was represented to them as a privilege worth achieving and, therefore, along with other devices of punishment and reward like marks, grading to 'good' and 'bad' classes, honour badges, and other privations and privileges, was intended as a means of encouraging good behaviour and helping prison management. Long periods of incarceration were not actually allowed for the additional reason that the proponents of the asylum expected that the discipline of the house would produce effects relatively quickly⁷⁷. In fact, some trustees of the houses of refuge believed that a period of time of one to two years would usually be sufficient for rehabilitation. Others estimated that a 'season' was enough, while others, more optimistic, considered a period of one month's stay as adequate, certainly for the best cases. By others the house was considered as a type of 'short, sharp shock' to impress the youngsters with the disciplined life of a well ordered regime. In any case, the fact that the release was only conditional facilitated a more

77. For some such views, see Rothman, op.cit., p.224.

liberal approach. Indeed, the control and supervision of the house over those released was always there, and there was also the possibility of revocation and the confinement in the asylum again. There were also the strict conditions of the indenture, the ever-present control of the master and boss, and the more or less isolated life in the country, away from the industrialised centres of the towns and cities where the evils and temptations abounded. All these assumptions rendered early release under conditions a feasible and acceptable method of penal policy in the houses of refuge.

A final reason, much more relative to the philosophy of the early reformers and administrators than to actual practice, would try to seek early release in the paternalistic, lenient and non-punitive nature of the institution. The children were there not for punishment but for reformation, shelter, advice, good food, clean clothes, well-regulated life and so on. All these indulgences depended upon the children's changing of life, their work, their obedience, their obtaining of good habits, etc. It is likely that the child-savers wanted to present them to the children, to make them participants in them, to impress them with the potential advantages of a life of virtue and industry, but not keep them until majority in that 'paradise on earth'. As they had got used to the idle and vagrant life they might possibly get used to a luxurious life as well. Such a danger was avoided through an early release. With this was connected the concern of the outside world for the transgression of the notorious 'less eligibility' principle; as the ideology around the house of refuge presented it, it challenged the

feelings of the honest families outside, when idle, vagrant and delinquent people were thrown in such institutions in which they might be 'supported, educated and taught a trade and thus derive advantages superior to those which are enjoyed by the offspring of the honest and deserving'⁷⁸. Early release neutralised such complaints and, therefore, reinforced the values and allayed the resentment of those who 'strive to maintain their families by prudent habits and honest industry'⁷⁹. Many European commissioners went to America in the 1830s to visit these institutions and report back to their governments; quite characteristically, they did not recommend the houses of refuge, although frank admirers of them, for the reason that such institutions, if not properly administered, tended to promote the very evils they purported to cure, that is they were likely to become more preferable to the lower classes living in worse conditions outside⁸⁰.

The Social Functions of the House of Refuge

The house of refuge originated as an attempt at social improvement through personal transformation of problematic youths. At the basis of that penal reform was a fear of a growing army of vagrant, idle and delinquent children infesting the streets as a result of parental neglect, lack of parental control and other 'environmental' causes. The aim of the

78. Crawford, op.cit., p.42.

79. Ibid, p.43.

80. See Beaumont & Tocqueville, op.cit., p.158. They close their report with the aphorism that 'the abuse of philanthropic institutions is as fatal to society as the evil itself which they are intended to cure'. Ibid, p.158.

institution consisted in taking the juveniles away from the corrupting influences of society, shelter them, enforce their power of resistance to external temptations, mould their minds to the dominant values, inure them with the virtues of discipline cheerful obedience and respect for authority and provide them with a modicum of education and plenty of manual work; finally, through the funnel of early release on licence return them as apprentices or indentured employees to 'respectable' members of the society. The form in which early release on licence emerged in the case of the house of refuge - indenture - was typically and substantially similar to the form of assignment under ticket of leave in Australia, and was determined by the condition of the productive forces at that historical juncture, particularly the condition of the labour market that was characterised by a permanent scarcity. Indenture was fundamentally a form of cheap labour, and no inmate was released earlier from a house of refuge in ways other than indentured labour. This fact combined with the importance put upon work during the period of confinement and the way in which convict labour was exploited there, lead to the conclusion that the house of refuge constituted a pool of cheap child labour within a growing economy permanently finding itself in greater demand for labour than that supplied. Since early release on licence in the form of indenture was an integral part of the system, one can suggest that it operated as a conveyor belt or channeling mechanism of a cheap labour force to the American labour market from a developing machine which picked up an army of idle and unproductive vagabonds and

transformed them to an obedient and submissive army of cheap productive labourers ready to employ. In fact such was the demand for child labour from outside employers that the Indenturing Committees could choose the most appropriate cases from a long list of applications. As the managers of the New York house of refuge confessed 'a discerning public seek for children who have been disciplined in the refuge and take them from us as fast as we can provide for them'⁸¹. William Crawford comparing the scarcity of labour in America with the surplus labour of London pointed out that 'such is the demand for labour of every description that no inconvenience is in this respect (providing work for ex-inmates) experienced'⁸². It was this scarcity of labour which made every penal institution a smoothly working enterprise⁸³.

If the situation of the labour market in America determined the form of early release on licence, the fear of the lower class and immigrant children endangering the social order, which led to the establishment of the house of refuge, was at the basis of its survival even after strong evidence that the institution did not solve the problem of delinquency. As David J. Rothman has showed, 'like other care-taker institutions,

81. William Crawford, op.cit., p.43.

82. Ibid.

83. Beaumont & Tocqueville in a long comment analysed why America was able to render her convict labour productive, op.cit., p.201. Child labour was very common in American economy, agricultural or manufacturing in the 1820s and 1830s. In 1820 the proportion of child workers in Massachusetts cotton mills was 45%, while in Rhode Island 55%. In Boston in 1832 it was estimated that two-fifths of the total number of workers employed in manufacture were children. See Faulkner, op.cit., p.298. The proportion of children employed in domestic service was at the period higher.

the refuge began as an attempt to eliminate delinquency and ended up as a practical method for getting rid of delinquents'⁸⁴. The house of refuge continued to be an essential part of the wider custodial network in America mainly for reasons of expediency. Reforming its inmates or not, at least it held safely for a period of time a young population who was considered 'dangerous' to the dominant social and moral order. Moreover, the house of refuge, by confining not only delinquent but also simply neglected or dependent children, served as a mechanism by which the inferior social status and the dependency of the juveniles was consolidated and the state control was conveniently extended over behaviour not strictly illegal but 'unbecoming to youth' and showing premature independence or defiance of the prevailing values. The house of refuge was one more brick 'in the wall that Americans built to confine and reform the dangerous classes'⁸⁵.

As it can be easily imagined the children of the lower classes were more vulnerable to the 'child-saving' enterprises, as they were more likely to 'infest' the streets, to be more 'neglected', and to have been socialised in the values of their own class which did not always coincide with those of the upper classes. Therefore, it is of no wonder that, as in the case of the penitentiaries, the overwhelming majority of the houses of refuge children were recruited from the bottom layers of the social structure. Their parents were overwhelmingly common labourers and semiskilled workers. It is certain that

84. D.J. Rothman, op.cit., p.261.

85. Ibid, p.210.

48

many had their parents incarcerated in the penitentiaries, while a great majority had lost one or both of them. Actually, from 257 children in the New York house of refuge in 1847, sixty per cent of the inmates were whole or part orphans⁸⁶. If the social composition of the house of refuge was largely lower class, the ethnic composition was mostly immigrant and foreigner. Of course, this characteristic of the refuge was greatly exacerbated by the end of the first half of the nineteenth century as the influx of immigrants, especially from Ireland, was occurring in an ever-increasing rate. In 1830 in the New York house of refuge 60 inmates out of 144 were native; by 1850 only 69 out of 247 were natives, while 134 of the remainder were Irish children, that is more than half of the total. In Philadelphia by 1855 only one third of the inmates were from American families, and as many as forty two per cent were of Irish parents. In Massachusetts in 1850, forty per cent were Catholics, mostly Irish, while all foreign born in the state were no more than nineteen per cent of the population⁸⁷. It is obvious from these numbers that aliens and lower class members were over-represented in the statistics of the house of refuge population, and this is clearly a reflection of the wider class, racial and religious conflicts which occurred in American society at that period, conflicts

86. See Pickett, op.cit., p.5. for some information on that. In 1850 out of the 2,742 persons who died of cholera in New York City 1,086 were Irish although they constituted 4 % of the total population. The Irish death toll was also very high in the canal works; the official had described the disease 'Irish fever'.

87. For these statistics see D.J. Rothman, op.cit., p.262. Also Pickett, op.cit., p.6.

that during later periods culminated to a serious warfare between the White, Protestant, native Americans and all the non-WASP groups of the time. In a report of the Society for the Reformation of Juvenile Delinquents for the year 1849, the president of the New York house of refuge Corporation expressed openly the concern of the natives about the increasing influx of immigrants:

The tide of emigration ...while it enriches our country, leaves much of its refuse in our city. Pauper families and even felons are not infrequently sent over to us as a cheap way of disposing of them ... thus swelling the number of houseless, friendless and lawless youth drifting loose upon society⁸⁸.

Needless to say, the fear of the aliens was not a new phenomenon in the 1840s; as early as 1801 Thomas Eddy, one of the founders of the New York House of Refuge, warned that West Indian and lower class European immigration would result in an uncontrollable younger generation⁸⁹. On the eve of the foundation of the house of refuge Phillip Hone, business man and Mayor of New York in 1825 looked pessimistically to the future because of the population changes:

The boast that one country is the asylum for the oppressed in other parts of the world is very philanthropic and sentimental but I fear that we shall before long derive little comfort from being made the almshouse and place of refuge for the poor of other countries⁹⁰.

It was this permanent 'siege mentality' which underpinned every reform effort in America. It had been at the basis of

88. Society for the Reformation of Juvenile Delinquents, Annual Report, 1849, p.11.

89. By the 1830s refuges were publishing the birth places of both inmates and their parents. As Mennel points out 'refuge managers did not view these poor peasant and their children sympathetically', Mennel, Origins...loc.cit., p.73. Reference to Eddy, op.cit.

90. Quoted in R. Pickett, op.cit.

the asylum movement. It will be at the basis of the reformatory movement as well. It is to an examination of this movement that our study now turns.

The Reformatory Movement

Introduction

The reformatory movement in America emerged in the last decades of the nineteenth century as a coherent and systematic endeavour of some penal reformers of the period for a new and more effective method of dealing with criminals⁹¹. What differentiates the reformatory movement from earlier penal reform efforts is its solid and vigorous 'theoretical foundation' which, however, at closer analysis is a facet of an ideological conservatism underpinning this and other similar contemporary social reforms. It operated at the level of state interventionism and came as a reaction to untrammelled competitive capitalism; nevertheless, it was imbued by a dislike of radicalism and socialism as alternative reform strategies. The reformatory movement was founded upon certain views of criminal causality that ignored the social reality of crime and located it

91. The best modern analysis of the reformatory movement to which we are greatly indebted has been done by Elliot Park Currie, Managing the Minds of Men: The Reformatory Movement, 1865-1920, unpub. Ph.D. Thesis, University of Calif. at Berkley, 1973. He distinguishes two periods in the development of the movement a) 1865-1900, which we shall examine here and b) 1900-1920, the progressive era, which is dominated by attempts at classification and individualisation, and an emphasis on the control of a surplus unskilled population in America. With this second period R.L. Boostrom is largely dealing in The Personalisation of Evil: The Emergence of American Criminology, 1865-1910, unpubl. Ph.D. thesis, Univ. of Calif. at Berkeley, 1974.

instead on 'individual deficiency'. The positivist individualism of this reform movement was coupled with an unfailing optimism that given proper remedial action at the level of personal reformation such deficiencies could be eliminated and the problem of crime solved. The promise of the movement had a strong appeal upon current sensibilities and a great impact upon the formulation of contemporary and future penal policy and penal theory. In the following sections we shall examine the basic tenets of this ideology, the Elmira reformatory as the first 'child' of the movement, and the social context within which the movement, the reformatories, indeterminate sentence and parole emerged.

The Basic Ideological Tenets of the Movement

While colonial thought equated crime with sin and ascribed both to man's essential moral depravity and the Jacksonian penal reform movement that led to 'the discovery of the asylum' shifted the emphasis of crime causality to a 'moderate environmentalism', the new penal reform movement returned the focus of analysis upon the individual criminal. Yet, it secularised the concept of crime conceiving of it as a matter of personal inadequacy, susceptible to improvement and change, not as a result of an irredeemably wicked psyche. Zebulon Brockway, one of the main architects of the reformatory movement, expressed this ideological shift well when he wrote that 'the causes of crime are primarily in the person, secondarily in the circumstances that surround him'⁹². It was not the

92. Z. Brockway, The Ideal Prison System for a State, Proceedings of Nat. Prison Assoc. (N.P.A.), 1870, p.39.

temptations of the social world at large which mattered; rather, it was the absence of the necessary ability of some to withstand these temptations, since not all people react identically under identical external pressures. Some became criminals, therefore, because of an inner weakness, a situation of mind which was largely attributed to an undevelopment of certain 'faculties'. The criminal was not seen as a 'fallen man' in the old Calvinist tradition: he was seen as 'an undeveloped man in all his elements'⁹³, as a 'less than whole' man, as a 'child of larger growth' who had the potential of becoming man in the full sense under proper influences, but for the time being he had not attained such completeness⁹⁴. According to Brockway the criminal impulse was not a product of 'intrinsic personal depravity' but a result of 'undeveloped intellectual faculties or a dormant will'⁹⁵. The criminal was a man in whom 'the emotional and passional gain supremacy over the rational and volitional parts of the nature', whose 'animal instincts and sentiments' were not properly checked by the 'higher faculties' as in normal persons⁹⁶. What the criminal man lacked was self-control as an essential prerequisite of normal and civilised life.

Another basic assumption of the reformatory ideology related to the basic similarity of all social problems and their

93. Carrol D. Wright, The Relation of Economic Conditions to the Causes of Crime, The Annals, May 1893, p.97.

94. See Phillips Brooks, Our Duty to the Prisoners, N.P.A., 1888, p.37.

95. Brockway, Reformation of Prisoners, Journal of Soc. Science, 6, 1874, p.147.

96. Idem, Prisoners and their Reformation, in the Transactions of the International Penitentiary Congress, London, 1872, p.613.

common cause: personal deficiency. Frederick Wines equated crime with lunacy and idiocy⁹⁷, while Brockway believed that 'pauperism, crime, insanity, idiocy, blindness, deafness, deformity, orphanage' were of 'essential identity'⁹⁸. This went some way to explaining to the penal reformers why 'the criminal class' was found at the lowest strata of the society, especially 'the ignorant, the shiftless, the indolent and dissipated'⁹⁹. Brockway dichotomised society into two classes: the 'law-makers' and the 'law-breakers', the former drawn from the 'well-to-do, the educated, the religious, forming the respectable classes', the latter from 'the poor in purse, degenerate in their whole being'¹⁰⁰.

But while the penal reformers agreed on the concept of 'undevelopment', they did not equally agree on the sources of undevelopment itself. An apparent eclecticism permeates most of their works, with constitutional, moral and institutional factors as likely sources of criminality¹⁰¹. The futile search for 'causes' or 'potential causes' of criminality started from these penal reformers to haunt generations upon generations of criminologists to come. Some sensitive theorists had achieved a degree of awareness of the futility of such an enterprise but could not get rid of the individualist 'trap', as an ultimate

97. Fred. Wines, Punishment and Reformation, N. York, 1895, p.160

98. Brockway, Indeterminate Sentences and their Results in N.York, J. Soc.Sc., 13, 1881, p.159.

99. Nathan Allen, Prevention of Crime and Pauperism, Proceedings of the Nat. Conf. of Char. and Corrections, (P.N.C.C.), 1879, p.114.

100. Brockway, Ind. Sentences, loc. cit., p.157

101. See e.g. the discussion on the causes of crime, F. Wines, op.cit., p.266-280 (Ch.XII)

explanatory refuge. Thus F. Wines had observed that 'everything is, or may be, a cause of crime in those upon whom it reacts unfavourably'. The same theorist attempted to transcend individual pathology and focus on 'external occasions' instead, as when he wrote that 'property is the occasion of theft; lewd women of licentiousness; virtuous women of rape; spirituous and fermented liquours of intoxication; men, women and children of murder'. Yet again he retreated to the notion of individuality by pointing out that 'identical conditions have their specific reactions for good or for evil'. The same penal reformer in a rare moment of theorisation captured the political essence of crime and its close relation to law when he declared:

Crime is not a character which attends to an individual. It is a simple phenomenon of ethical aberration from a standard type. It is rather a complex relation which the law creates between itself and the law-breaker. The law creates crime. It, therefore, creates the criminal, because crime cannot be said to exist apart from the criminal. The criminal is a man who puts himself in an attitude of antagonism to the law¹⁰².

In the same vein, he observed that sometimes 'many martyrs' have been 'branded as criminals' by tyrants and 'what is crime in one age is no crime in another'. Nevertheless, he could not elaborate on this substantive point because of the immanent conservatism of his wider vision, but suggested instead that since the origins of crime were so 'complicated and various', yet a capable individual could withstand the innumerable external potential influences, it was 'more practical to restrain the operation of the causes of crime in individuals than in the community at large'¹⁰³. The road to the solution

102. Ibid, p.24.

103. Ibid, pp.295-296

of crime passed always through the individual, in the view of the penal reformers. Personal deficiency begged for personal reformation.

To redeem individual defects the penal reformers proposed a special type of penal treatment that would develop and strengthen the prisoner's character to the point of completeness and maturity. According to Brockway, what was needed was 'cultivation', in the sense of training and exercising the will, developing inner self-controls, in short, reforming the whole personality to normal, civilised standards¹⁰⁴. Wider social advantages were explicitly expected from such a policy. Particularly appealing seemed to the reformers the economic effect of transforming idle and vicious vagabonds and criminals into industrious and productive labourers:

It is always economy for the State to utilise whatever of capital exists in the persons of its citizens. There is great value in an honest man, in a respectable, industrious citizen, and to transform a worthless vagabond or criminal into such a citizen is certainly wise economy¹⁰⁵.

One reformer calculated that each individual pauper or criminal cost the economy at least 5,000 dollars during his lifetime, while the economist Loren Blodget lamented for the increase of the idle population at a period of growing labour demand. The Governor of Michigan rudely warned that 'if we can cure crime, we make money', Eugene Smith conceived of penal reform as 'a measure of political economy', while a Senator rejoiced at the

104. Brockway, Prisoners and their Reformation, loc.cit., p.615.

105. A.H. Young, Reform in Penal Treatment, P.N.C.C., 1883, p.182-183.

potential of criminals becoming 'creators of wealth and not consumers alone and destroyers' and 'an expense to the state and the taxpayer',¹⁰⁶.

The Content of 'Reformation'

The reformatory movement was imbued with a fundamental confidence in the reclaimability of all criminals, except perhaps of a tiny minority of 'habitual' or 'incorrigible', and the necessity and possibility of 'subjective changes' for the mass of offenders. Reformation meant a thorough transformation of character, a deep and everlasting change.

Elliot Currie thus summarises the principal content of 'reformation':

The prisoner was to be sent back into the world quite literally a new man, with new impulses, new habits, and new motives of action able to withstand the temptations and illicit opportunities that civilisation inherently offered. This transformation had to be more than a mere enforcement of good behaviour within the prison; the criminal's entire nature had to be drastically altered, to the end of securing his willingness and capacity to behave properly under the exacting conditions of 'daily life in ordinary social relations'.¹⁰⁷

In order for this change to take place the prisoner was to be under the constant presence of 'natural' influences like those applied in the world outside prison. The penal setting was regarded indispensable for obvious reasons of social security. The true reformatory course envisaged would not create an unnatural setting like that of penitentiaries, but try to 'reproduce, as closely as possible, the benignly formative forces at large in the society as a whole',¹⁰⁸; this was what

106. These and other similar views are discussed in Currie, op.cit., p57ff

107. Currie, op.cit., p.67.

108. Ibid, p.68.

the then existing prisons lacked. Wines and Dwight after an exhaustive investigation of all penal establishments of the country in 1865 had come to the conclusion that 'there is not a State prison in America in which the reformation of the convicts is the one supreme object of the discipline, to which everything else is made to bend',¹⁰⁹. The reformatory movement to a large extent came as a reaction to the existing prison system and its disadvantages. The contemporary prisons were regarded as totally inadequate to achieve any reformatory goal; more than that, they had supposedly harmful effects on their inmates. A penal reformer characterised even the best prison as 'a school of vice and crime',¹¹⁰, while another found that 'nine-tenths of the prisons in the United States today are manufactories of the criminal classes. They are Universities of crime',¹¹¹. The main criticisms against penitentiaries and prisons related to their contaminating influences as a result of indiscriminate mingling of different criminal characters, their degrading function with the lock-step, the striped-clothing and other devices; the brutalising effects of corporal punishments; the widespread use of technical rules which imposed an external compliance only and not an inner acceptance; their extravagance; and finally, their failure to provide the inmates with habits of industry and a capacity

109. E.C. Wines & Th.W. Dwight, Report on the Prisons and Reformatories of the United States and Canada, Albany, 1867, p.61.

110. W.F. Spalding, Some Methods of Preventing Crime, P.N.C.C., 1880, p.60

111. C.T. Lewis, Uses of Imprisonment, Proceed. of the Intern. Congr. of Charities, 1893, p.102.

for industrial labour instead of simply exploiting convict labour',¹¹².

The reformers favoured the idea of 'actual conversion' not 'mere subjection',¹¹³. Where the old system tried to crush the will of the individual, the new system would help this will to mature and strengthen through enlightened persuasion. As Wines and Dwight suggested 'what we want to gain is the will, the consent, the co-operation of these men, not to mould them into so many pieces of machinery',¹¹⁴. This would ensure reliable behaviour for ever, and not only for the time when the repressive apparatus of prison discipline was present. Instead of the unnatural lack of any sociability either in the Pennsylvania or the Auburn system, the penal reformers suggested controlled and supervised association. In the place of the corporal punishments they proposed a system of 'organised persuasion' and a system of 'natural' punishments and rewards in imitation of the real world outside¹¹⁵. Instead of the existing extravagance they favoured 'honest parsimony' and 'rigid economy'. Instead of the existing types of prison labour that reduced the criminal to the level of a 'labouring machine' without any further advantage they envisaged work in prison as an opportunity for teaching industrial skills and

112. For an extensive analysis of these criticisms see the report by Wines & Dwight, op.cit. (passim).

113. As Fr. Wines put it, op.cit., p.208.

114. Wines & Dwight, op.cit., p.181.

115. This did not mean that the penal reformers were more 'lenient' or opponents of corporal punishment altogether. In fact they were against 'indiscriminate brutality' and highly favoured 'judicious application of physical violence' as the Elmira reformatory was to witness.

industrial habits. According to Wines and Dwight:

It is in prison that he (the criminal) must become accustomed to work steadily, diligently and strenuously from eight to ten hours a day, just as other labourers do, or he will never be able to live by the labour of his hands amid the sharp and active competition that exist among the toiling millions of America¹¹⁶.

The moral, physical and general regeneration of the criminal was to be attained through the application of reformatory agencies like religion, education and labour. The justifications of the 'reformatory agencies' and their supposed functions are identical to those of the Irish Convict system we have already analysed in great detail, in the previous chapter, and thus we are not going to stay at this point for long. Generally, the purpose of religion was rather to impart a spirit of order, subordination, self-mastery and the same, than the specific dogmas of Christianity. The reformers' ideas about education mark a reversion in emphasis from previous ages. While penitentiaries were based upon reflection, concentration and repentance, the reformatory would give the prisoner 'better thoughts' and prevent him from dwelling very much upon his past and present predicament¹¹⁷. Education would not include only an injection of intellectual information, or raise extravagant ambitions, but equip the inmates with some useful knowledge ranging from naive chrestomathy to subtle political indoctrination¹¹⁸. As in the case of the Irish Convict system 'education in prison should provide a modicum

116. Wines & Dwight, op.cit., p.264.

117. See Wines & Dwight, op.cit., p.221, also F. Wines, op.cit. p.205.

118. The similarity with the Irish Convict system, both in its 'anti-intellectualism' and the content of education, is really amazing.

of intellectual and technical proficiency, coupled with lowered aspirations and a ready acquiescence in the principles of the existing political and economic order'¹¹⁹. Finally, training for effective labour was the basis upon which all reformatory agencies were based. Brockway regarded that the whole 'problem' of reformation revolved around the training of prisoners 'to instinctive, habitual, quick adjustment of themselves to the true economic environments', training to 'industrial co-action'¹²⁰. The aim of reformation was to develop in the prison population skills and habits appropriate to an industrial labour force, and this aim was in accord with wider socio-economic needs of the period, as we shall see below.

The Reformatory Movement and the Criminal Justice System

Indeterminate sentence and parole were produced as logical corollaries of the reformatory ideology. The goal of penal reformation could be achieved, but not within pre-imposed limits of time. Reformation required a period of time not determined by the past act, but by the character of the criminal and his response to the reformatory agencies. Actual release, therefore, was envisaged by the penal reformers only when the prisoner had been 'reformed' and his personal fitness for further liberty guaranteed. To test this fitness outside the prison walls and to ensure the criminal's integration into 'the ranks of honest labour', a system of early release on licence was proposed under the name of parole. In order to

119. E. Currie, op.cit., p.39.

120. Brockway, *Characteristics of Reformed Criminals*, quoted by Currie, op.cit., p.90.

break with traditional legal formalism and established penal practice, the reformatory movement had to attack the criminal justice system at various levels and construct a new approach towards the nature and purpose of criminal law, the state etc. The new perspective which justified every deviation from established penal theory and practice was found in the vague and all-inclusive notion of the 'protection of society'. Reformation was suggested as the best method of 'social protection' at that particular juncture, and, therefore, it was reformation and not regard for justice or legality that mattered. Retributive punishment the reformers saw as anachronistic and barbaric, relic of bygone absolutist and authoritarian regimes. In a true democratic society justice was taken for granted and thus any fear of power abuse by the rulers, guaranteed against by concern for personal freedom and legal procedures, was not justified in the view of the penal reformers¹²¹.

It is sometimes believed that reformation arose out of humanitarian concerns and as a reaction to revengeful and barbaric retribution. This is due to the usual confusion between the rhetoric surrounding a practice and the actual practice itself. The examination of the reformatory movement reveals that what the reformers were actually seeking was not a more 'humane' or more 'lenient' penal system, but a more flexible and more rational control over the criminal population.

121. For a critique of retribution and fixed sentences see e.g. F. Wines, op.cit., p.210, also pp25ff. For an extensive analysis of the reformers' views regarding the role of the criminal justice system see Currie, op.cit., pp.102ff.

E. Currie comes to the conclusion that the reformatory movement was 'part of a more general attack on the 'laxity' and inefficiency of the 19th century criminal justice system. This attack, in turn, was only one aspect of a general demand, common in post-war 'reform' thought, for a more active and flexible state apparatus for the control and discipline of the depended classes'¹²². Most of the reformers agreed that the contemporary attitudes to the criminals were excessively sentimental and lenient. All of them believed that 'the right of society had been unduly neglected in the recent past, and they were determined to reverse the emphasis'¹²³. Apart from indeterminate sentence and parole other key features of the new demand for more rational control were: demands for centralisation of crime control agencies; arguments against the idea of the presumption of innocence; laws for the permanent confinement of the 'habitual criminal'; attacks on existing rules concerning trial procedure, the excessive right to appeal, the composition of jury, which should not include members of the labouring classes; attempts to better organise the police; demands for improved registration and identification of criminals; and many others¹²⁴.

The Reformatory Movement and Social Science

The reformatory movement constituted part of the wider 'social science movement' that resulted in the creation of the

122. E. Currie, op.cit., p.104.

123. Ibid, p.111.

124. As E. Currie observes 'running through all these efforts was the idea that criminal justice in the United States was a drastically ineffective and unsystematic instrument in the face of the rapid growth and spread of the criminal classes', op.cit., p.138-9.

American Social Science Association in 1865. Both shared an essential 'conservatism', in the sense that although fighting for reform they operated within the confines of capitalism. Their reform proposals rejected the dominant laissez-faire approach that in sociology had found an equivalent in social Darwinist and Spencerian theories of natural evolution and the survival of the fittest;¹²⁵ yet, these reform proposals rejected any radical critique of capitalism whose main pillars they never challenged. Private property the reformers regarded as the cornerstone of civilisation and 'the very foundation of social advancement',¹²⁶. William T. Harris, the famous philosopher and pedagogue, described the discovery of private property as 'the discovery of the possibility of human freedom',¹²⁷. The accumulation of wealth they saw as made for the common interest and not for the interest of the rich. Most of them were aware of the close connection between economic conditions and crimes against property, and accepted the possibility that abolition of private property would reduce crime rates. They abhorred, however, such a possibility because, as a social scientist observed, 'of all crimes the crime of socialism is the least to be endured'. He characterised socialism as 'the

125. For an excellent discussion of these theories see R. Hofstadter, Social Darwinism in American Thought, Boston, 1955 (rev.ed.). For a radical analysis of the formative years of American Sociology see H. & J. Schwendinger, The Sociologists of the Chair, N. York, 1974. For 'reform' social Darwinism and its influence upon 'progressive' correctional reform see R.L. Boostrom, op.cit., esp. Ch.3 and 4.

126. C.D. Wight, Outline of Practical Sociology, 1899, p.308

127. W.T. Harris, The Right of Property and the Ownership of Land, N.S.S.A., 1887, p.146, quoted by M. Curti, The Social Ideas of American Educators, N. Jersey, 1968, p.323.

paradise of the fools, the asylum of the lazy men, the heaven of the worthless'¹²⁸. William T. Harris thought that 'socialism would destroy the precious gain to the sacredness and development of personality that private property had brought, and would revert to the primitive and oriental subordination of the individual to the group. It would, in short, turn the hands of the clock backward'. It would 'put a premium on weakness and incompetency at the expense of the able and the thrifty'¹²⁹.

The penal reformers and the 'reform Social Darwinists' demanded state interference as the only means by which the problems created by untrammelled competitive capitalism could be checked. If laissez-faire were allowed absolute sway, these scientists were afraid, the capitalist system would collapse from within. The survival of the fittest was a sound idea, yet measures had to be taken on behalf of the 'struggling multitude' that was left behind in the race of social progress, not so much from humanitarian reasons as from sheer self-interest of the superior classes. They were afraid that the discontented masses were becoming conscious of their power and 'like the Communists of Paris' might attempt to 'draw down the whole fabric of society into one common vortex of destruction'¹³⁰. The reformism of the social science movement was underpinned by this fear of the lower orders, and was suggested as an alternative to 'the possibility of action by the masses themselves'

128. Sam. G. Smith, *Relation of Crime to Economics*, N.P.A., 1896, p.263.

129. W.T. Harris was an Hegelian philosopher and bitter opponent of socialism and Marx whom he tried to refute in several of his works. For his ideas see M. Curti, op.cit., the above quotations are on p.330.

130. D.A. Wells, *The Production and Distribution of Wealth*, loc.cit., pl-22

for the overthrow of society¹³¹. The interventionist tone of their theories arose out of an interest in preventing open class war and social disintegration at a period when strikes, riots and various populist and socialist movements were shaking American society¹³². The reformers' efforts were ultimately directed to dampening down rebellion and revolution by the lower classes and thus maintaining the prevailing economic system of capitalist relations of production and exchange. The form of state intervention at the social level, explicit in the reformatory movement, paralleled increased state intervention at the economic level that originated in the last decades of the century as a cause and effect of clear tendencies for capital accumulation, industrial consolidation spreading of corporations and trusts, and establishment of monopoly capitalism in the first decades of the twentieth century¹³³.

As we have seen, crime was equated to pauperism in the eyes of the reformers. Both were considered as symptoms of inability of the lower classes to observe the social order. Fr. Wines regarded crime as 'the measure of the criminal's opposition to social institutions'¹³⁴. Smith thought that

131. 'in the form of strikes, trades-unions, the crystallising antagonism of labour against capital, the spirit and the teaching of socialism, the practice of communism', *ibid*.

132. Especially, the Draft Riots of 1863, the Railroad Strikes of 1877 and the movements of the 80s and 90s. For a short American History see Wright et.al., The Democratic Experience, Glenview, Illinois, 1968. For a history of labour, see J. Kuczynski, A Short History of Labour Conditions Under Industrial Capitalism in the U.S.A., 1789-1946, London, 1973 (3rd ed.).

133. For a comprehensive economic history of the U.S.A. see the massive classic by H.U. Faulkner, American Economic History, N. York, 1960, (8th ed). For the effects of 'corporatism' on 'corrections' see R.L. Boostrom, op.cit.

the criminal 'comes to regard society, government, law, the rights and established order of civilised life with a hostile eye. He becomes the enemy of industry and plodding labour',¹³⁵. The reformatory movement reflected these concerns for social order at a period of 'rising' tides of crime and continuous social unrest. The social climate in the last decades of the century has been well captured in the following quotation:

The most alarming feature of this period is the rapid growth of an antagonism to fixed institutions and ideas, to prevailing laws and systems of ethics, to fixed habits of industry, to loyal service in return to wages paid, to respect for good order, for the laws securing property, and for nearly everything which sane people have been accustomed to consider necessary to the safety of society. Under the various names of Socialism, Anarchy or Populism or under no name whatever, by thousands of people scouting the idea of industry and defying the law, a vast number of men seem ready for acts of violence and any form of crime¹³⁶.

Charles Loring Brace in the same vein warned his compatriots about the day 'when the outcast, vicious, reckless multitude of New York boys, swarming now in every foul alley and low street, come to know their power and use it',¹³⁷. This alarm of the upper classes shared by the penal reformers explains both their ultimate conservatism and the demand for better 'control' of the dangerous classes which were implicit in their reform proposals.

Another key theme of the reformatory ideology closely linked with the fear of the lower orders, we have just described,

134. F. Wines, op.cit., p.208

135. E. Smith, Reformation or Retribution, J.S.S., 31,1894,pp.77-78

136. F.J. Kingsbury, A Sociological Retrospect, J.S.S., Nov.1896,p.2.

137. C.L. Brace, The Dangerous Classes of New York and Twenty Years Among Them, N. York, 1872, p.322.

was the contribution of immigration to crime and social disorder. As in previous periods, so now crime was regarded as an 'alien phenomenon' brought about by the waves of immigrant populations. The fear and hostility against the foreigners was highly increased at the last decades of the century after the influx of millions of lower class, unskilled labourers, farmers or impoverished Irish, who, unlike previous generations of immigrants attracted to the west, were swelling the slums of the industrial cities¹³⁸. The fear of immigrants as potential competitors in the labour market was old, as well as the fear of Catholicism and the obsession that the Pope was to invade Protestant America to establish Catholicism there. Now, more and more immigrants came to be regarded as a great source of vice and crime. In 1850 the criminal statistics showed that although the immigrants constituted 15 per cent of the population they formed 50 per cent of the convicted offenders, something that reinforced cultural stereotypes and prejudices. Francis Wayland lamented that they were for years 'receiving the very dregs of European society, the scum of European cities, the destitute, the nihilist, the anarchist, by scores of thousands annually'¹³⁹. Since the criminal was conceived as a kind of 'outsider' he was to be brought within 'the orbit of civilisation' through assimilation and 'Americanisation'. One basic aim of the penal treatment was to teach 'the American principle of self-control'. Furthermore, the conception of

138. In a following section we shall come back on this point with some statistical information.

139. Fr. Wayland, Report of the Commission on Criminal Law Report, N.P.A., 1892, p.89.

crime as a lower class and alien phenomenon added legitimacy to the reformers' view that the existing social order was basically sound, and pointed instead to remedial interference with the lower classes and the immigrants in an effort to stabilising social order and prevent major socio-political upheavals. Looked at under the light of the contemporary social context 'remedial interference' by the state meant in the last analysis suppression of the lower class and immigrant populations.

If control of the subordinate was an ultimate aim of reformation, their thorough transformation to self-regulated, obedient and acquiescent industrial labourers was a more near-at-hand objective. The reformers believed that 'industrial inefficiency' is at the root of the criminal character,¹⁴⁰ and that teaching of industrial skills and habits was a primary reformatory agency. Industrial habits included self-control, diligence and industry, self-denial and productive personal exertion, regularity, punctuality, silence and industry. Such habits were, according to W.T. Harris, necessary social virtues in the age of machinery 'when so much depends on concerted action',¹⁴¹. In short criminals had to be inculcated with an instinctive capacity for industrial labour. This was a reflection of wider socio-economic needs, particularly the creation of a disciplined, self-regulated and acquiescent work force in a growing industrial economy like that of America

140. Brockway, Characteristics of Reformed Criminals, quoted by Currie, op.cit., p.90.

141. W.T. Harris, The Philosophy of Crime, quoted by Currie, op.cit., p.91.

after the Civil War. Industrialism required a labour force not only disciplined and self-regulated, but also 'sufficiently committed and loyal to the general scheme of things to keep producing on this level despite the privations and uncertainties that they faced'¹⁴². The 'reformatory course' was designed to supply such a loyal labouring force through the transformation of the whole man it envisaged. The criminals had to be 'converted' into upright, disciplined, prudent and productive citizens or kept out of the way indefinitely under indeterminate sentences, until their 'reformation' was accomplished.

Indeterminate Sentence and Parole

Indeterminate sentence and release on parole constitute two outstanding elements of the reformatory movement, consistent with its basic tenets and logically derived from the 'individual pathology' model dominating reformatory thought. Indeterminate sentence, as we have already noted, marked a break with traditional legalist notions of fixed sentences as equivalent exchanges to crimes committed; a break that was justified through appeals to the 'protection of society' as the highest good in social life. Since reformation, as envisaged by the penal reformers, satisfied the interests of both the society and the criminal it was increasingly presented by the reformers as not only a right but also a duty of the state towards the criminal¹⁴³. Reformation was portrayed as an expression of paternal care by the State, not as an imposition of revengeful

142. Ibid, p.57.

143. F. Wines, op.cit., p.223.

feelings, like retributive punishment. The equivalence of crime and punishment prevalent in past periods of barbarity and absolutism, from the fear of excessive penalties by autocratic and authoritarian states, had no place in a democratic society, where the state was 'the embodiment of the will of the social whole' and existed 'solely for the protection and well-being of society'. The state was seen as a 'benign power, acting with a beneficent purpose' and in a parental capacity¹⁴⁴. It was on this ground that indeterminate sentence was justified and the expanded control of the state over the prisoners, implied in this device, legitimated.

The penal reformers had many other reasons for favouring indeterminacy. Fr. Wines observed that 'all definite sentences may be assumed to be unjust, either by way of excess or of defect. They are also inexpedient. Short sentences fail in many cases to make any impression other than one of indifference to imprisonment...Long sentences on the other hand, especially life sentences, depress the convict too much, by depriving him of any well-founded expectation'¹⁴⁵. Indeterminate sentence was supported as a powerful incentive to reform. Furthermore, 'since reformation is a work of time' a 'benevolent regard to the good of the criminal himself, as well as to the protection of society, requires that his sentence be long enough for reformatory processes to take effect'¹⁴⁶. Indeterminate

144. Fr. Wines regarded the state as 'the representative of the entire community' and believed that 'the State is, in a certain metaphorical and legal sense the parent of the people'. op.cit., p.297, 299

145. Ibid, p.214.

146. Ibid, p.223. In the Declaration of Principles adopted by the reformers as the 'manifesto' of the reformatory movement in the Cincinnati Congress of 1870 it is similarly written that 'reformation

sentence was also appreciated as a means of prison discipline; it put into the hands of the administrators 'the precise lever' that they needed 'in order to subvert the criminality of the convict',¹⁴⁷. It put the prisoners into 'the most favourable attitude to be operated upon, in the condition most favourable to a cure',¹⁴⁸. It gained the co-operation of the prisoner, because 'the supreme agency for gaining the desired co-operation on his part is power lodged in the administration of the prison to lengthen or shorten the duration of his term of incarceration',¹⁴⁹. Finally, indeterminate sentence was a more rational approach to the problem of crime as nobody could estimate from the beginning the amount of time required for the criminal's reformation 'any more than we can tell how long it will take for a lunatic to recover from an attack of insanity',¹⁵⁰.

In a frequently quoted passage, Brockway expressed the central position of indeterminate sentence within the proposed 'reformatory model' when he declared that:

all persons in a state, who are convicted of crimes before a competent court, shall be deemed wards of the state, and shall be committed to the custody of guardians until... they may be returned to society with ordinary safety and in accord with their own highest welfare¹⁵¹.

Another reformer suggested that 'a criminal is a man who has suffered under a disease evinced by the perpetration of crime

is a work of time, and a benevolent regard to the good of the criminal himself, as well as to the protection of society, requires that his sentence be long enough for reformatory processes to take effect'.

147. F. Wines, op.cit., p.209.

148. Ibid, p.210.

149. Ibid, p.224.

150. Ibid, p.215.

and who may reasonably be held to be under the dominion of such disease, until his conduct has afforded very strong presumption not only that he is free from its immediate influence but that the chances of its recurrence have been exceedingly remote'¹⁵². Another reformer proposed that 'instead of so many years for certain crimes, let it be the medicine of restraint for the prisoner until he is cured. Treat crime as a disease, the criminal as a patient'¹⁵³. The potential for prolonged confinement in case of 'unreformed' criminals meant that the state control over the criminal was substantially increased.

Parole in America developed as a necessary corollary of the indeterminate sentence, and was sought by the penal reformers as an inevitable adjunct of the 'reformatory' sentence¹⁵⁴. Parole was envisaged as a critical stage in the whole process for it was intended to be a 'test of fitness' and a means of gauging the criminal's degree of successful transformation, under conditions of ordinary social life and away from the regimented setting of the penal institution. The purpose of parole was to follow the criminal through the period

151. Brockway, *The Ideal of a True Prison System for a State*, *Transactions of the Cincinnati Congress*, 1870, p.54.

152. Amer. Corr. Ass., Congress of Corrections, *Proceedings*, 1870

153. *Ibid*, 1874.

154. The idea of parole as such was not an 'invention' of the penal reformers of the era. Another well known reformer, S.G. Howe, expressed in the late 1840s the view that 'The doctrine of retributive justice is rapidly passing away, and with it will pass away, I hope, every kind of punishment that has not the reformation of the criminal in view. One of the first effects of this will be, I am sure, the decrease in the length of sentence and the adoption of some means by which the duration and severity of imprisonment may in all cases be modified by the conduct and character of the prisoners. What we want now -

of his absorption in the ranks of labour, settled life and submission to the 'social harness' of 'civilisation'. While under absolute release the state had no right to such type of 'following-up', parole was proposed as an actual expansion of state power over the ex-prisoner. Neither pardons, nor good-time laws had accomplished any reformatory purpose, asserted the penal reformers. Pardons 'unsettled minds' by directing thought to this indulgence that was an act of grace, whereas good-time remissions, although instrumental for good behaviour inside prison, did not deeply affect the prisoner's genuine change. It was the possibility of recall and the existence of conditions and supervision that made all the difference under parole. These elements made parole neither a kind of pardon nor a soft and lenient alternative, as was sometimes supposed. Parole was a powerful means of repression in the hands of the state since it enabled it to return a parolee back to the prison even without the commission of a crime but on the slightest indication that he is going to relapse into criminal behaviour. On the other hand, parole was congruent with the notion of state 'paternalism' as it would firmly support the criminal precisely at the moment when, under simple retributive punishment, the state was abandoning him; his re-entry into the free society. Finally, parole was justified on economic-fiscal reasons, being a measure cheaper than custodial punishments¹⁵⁵.

what no system that I know of offers - is the means of training the prisoner's moral sentiments and his power of self-government by actual exercise. I believe that there are many who might be so trained as to be left upon their parole during the last period of their imprisonment'. S.G. Howe, Letter, Third Annual Report, N.Y.P.A., 1846, p.20-21.

The extension of state control over the criminals underlying the proposals for indeterminate sentence and parole was part of the reformers' effort to create a more flexible and more effective mechanism of control of the criminals, along with other measures for the better control of all problematic populations, especially the poor¹⁵⁶. Parole supervision in the community has been rightly compared to the emergence of 'friendly visiting' of the poor (in place of giving alms only) by social caseworkers¹⁵⁷. 'Friendly visiting' became a well established institution by the 1870s and aimed at the 'finding of those who are the truly deserving recipients for charity', the surveillance of the lower classes, and their possible socialisation to upper class values and way of life through more pervasive but less openly oppressive means¹⁵⁸. Parole supervision in America was carried out through special agents who during the 1890s along with other social workers attained professional status¹⁵⁹. As a legal provision parole was firstly introduced in the Elmira reformatory, in New York; it is on that 'model' institution that we turn our focus now.

155. For a good summary of the reformers' views on parole, see Fr. Wines, Parole, N.P.A., 1892.

156. For these efforts at centralisation of control of the charities see K. Woodroffe, From Charity to Social Work, RKP, London, 1962, Ch.iv: 'Poverty and Oysters in the U.S.A.' p.77ff.

157. By Currie, op.cit., p.125.

158. For an analysis of this technique, see M.E.Richmond, Social Diagnosis, N. York, 1917 (Mary Richmond has been the main exponent of this method. See K. Woodroffe, op.cit., p.101ff)

159. As we shall see, however, at the beginning the main link between the parolee and the penal institution was maintained through mail.

The Elmira Reformatory

The Elmira reformatory was the first 'child' of the reformatory movement and constituted a partial embodiment of the new ideas¹⁶⁰. It came about as a cautious experimentation with the reformatory ideas rather than as a full-blown implementation of the principles of reformation. Thus, although the reformatory movement aspired to the actual solution of the crime problem through the reformation of all the criminals, the Elmira reformatory was built as a special establishment for young adults 16 to 30 years of age and first offenders at that. Even in the case of indeterminate sentences, the reformatory had to compromise with an upper limit of 5 years, an indication of the well entrenched position of punitive retributivism which the reformers had not been able to annul. The reformatory was founded under law in 1869, but it was not until 1876 that it opened its doors under the superintendence of Zeb. Brockway himself. In 1878 another reformatory opened in Michigan, four more opened during the 1880s and five more during the 1890s. The first reformatories were hailed as 'the coming system of modern civilisation'¹⁶¹ and as a 'bulwark against crime'¹⁶². The sad story repeated itself with these 'model' establishments: by the end of the century the reformatories were increasingly seen as 'huge chambers of horrors'!

160. For descriptions of the institution see particularly Fr.C. Allen, Handbook of N. York State Reformatory, Elmira, 1927 and Alex Winter, The New York State Reformatory in Elmira, London, 1891. Also, Fr.Wines, op.cit., p.192ff, Z. Brockway, Fifty Years of Prison Service, N. York, 1912.

161. F. Wines, op.cit., p.193.

162. Elmira Report, 1877, Report of Board of Managers.

The internal structure of the Elmira reformatory highly resembled that of the houses of refuge and the Irish convict prisons, although the latter were designed for convicts and not young adult offenders¹⁶³. It consisted of a three-grades system, a system of marks, industrial training, education, indeterminate confinement within the legal maximum and early release on licence (parole). The grades and marks operated not only as powerful incentives to good behaviour, but also as elements of the system of 'natural' punishments and rewards imitating the real social life outside with its hierarchical structure. The daily routine was designed so as to occupy the mind and body of the inmates and bring them under the everpresent sway of reformatory agencies like religion, education, labour and physical training. Industrial training was to be attained through learning of various trades. Academic education included apart from the three 'Rs', courses in physical geography, natural science, geometry, philosophy and ethics. A prison weekly - called SUMMARY - printed and edited by the inmates themselves completed this education and kept them informed about outside life. Special emphasis was put upon physical education and a

163. One must refer here to the influence which the Irish system exercised upon the American reformers. Wines & Dwight suggested that 'the Irish system of convict prisons is upon the whole the best model of which we have any knowledge;...its broad general principles may be applied with entire effect, in our own country and in our state', op.cit., p.72. G.B. Hubbell, travelled on his own to England and Ireland to study the penal systems of these countries. He wrote on his return: 'Leaving the English penal servitude prisons, with this rapid and brief survey, we turn now to the Irish system of convict discipline; and truly it is like finding, in the midst of a dreary desert, some beautiful oasis, which at once charms the eye and refreshes the mind with its landscape of sparkling fountains and living verdure...' After the 'pastoral' description he suggested with emphasis that a new prison be built in which the Irish convict system should be 'adapted to advantage', G.B. Hubbell, 22nd Annual Report of NYPA, 1865, p.186-196. The New York Prison Association, agitated

series of exercises in the Swedish technique, gymnastics, athletics, even callisthenics; hot baths and massages were part of the daily routine. Organised sport and drama performances helped prison discipline and recreated the inmates, while military drills at a later period were introduced as supplementary measures of discipline and training. The aim of the reformatory course was, according to Brockway, 'to seize upon and manage the minds of its men', in an attempt to create in them new habits and a totally new character. Religion, education and labour aimed at the creation of upright, obedient and disciplined citizens and workers, cheerfully accepting their lot in society and spontaneously assenting to the values of nineteenth century capitalism. Industrial training was specifically designed not to exploit the convict's labour but teach him technical skills and the habits of steady, self-regulated and persevering labour¹⁶⁴. The reformatory was envisaged as a miniature of industrial society, with its stratified structure, its system of rewards and punishments, and its constant demand for personal exertion, competition and unremitted labour as prerequisites for success, advancement and social promotion.

Those who had arrived at the first stage after continuous good conduct and the obtaining of the necessary amount of marks

for the erection of a new prison 'to test, on a small scale and under the most favourable circumstances... the Irish system of prison discipline', 24 Annual Report, Albany, 1869, p.27.

164. E. Currie suggests that 'the heart of the Elmira system was the attempt to create a near totalitarian regime in which the habits, skills and values of a loyal and efficient work force would be forcefully and permanently instilled in the inmates through a systematic programme of industrial training, moral and political education, physical renovation and judicious violence', op.cit., p.150.

were eligible for parole. The cases were considered by the Board of Managers, on the recommendation of the superintendent, but at least at the beginning there were no statutory standards for release. However, there is some evidence that no prisoner was discharged 'no matter what his record in the reformatory may have been' until he had found for himself a kind of employment¹⁶⁵. At the time of release material help was provided to the parolee, in the form of a new suit of clothing and the fare to his place of destination. He was also supplied with a pack of blank reports to be filled at specified periods. When he had arrived at his place, he was obliged to visit his supervisor--guardian to whom he had to report once every month at least. He was also obliged to notify the superintendent in Elmira about all these activities; all these reports together with the guardian's and employer's observations were kept in a file in the reformatory. Thus, the link between the reformatory and its ex-inmates was maintained closely, a case we have already observed in the houses of refuge and the Irish prisons. A distinctive feature of parole in Elmira was that the period of supervision was a fixed period of usually six months, and not proportionate to the term served; it was believed that 'a longer period under supervision would be discouraging to the average paroled man'¹⁶⁶. Another distinctive characteristic was that parole supervision was carried out for all and every where by special agents other than the police. It must be noted

165. F. Wines, op.cit., p.306.

166. The Origins of Parole, in Manual for Parole Officers, 1953, reprinted in Ch.L. Newman (ed), Sourcebook on Probation, Parole and Pardon, Springfield, Ill., 2nd ed., 1964, p.22.

that even the best supporters of the Irish system were reluctant to wholeheartedly suggest the system of ticket of leave there, for they considered it 'un-American to place an individual under police supervision',¹⁶⁷. After all, they were conscious that such a system would have been ineffective in the first place because of the absence of a well-organised and centralised police force, like the Irish Constabulary, and the absence of 'natural' state boundaries that could prohibit mobilisation of ex-prisoners to more lenient jurisdictions or their actual eclipse in the wilderness beyond the frontier.

Indeterminate sentence and parole have not been necessarily linked in world penal practice, although parole introduces a degree of indeterminacy even to a fixed sentence. In the minds of the penal reformers indeterminate sentence and parole were ideally closely connected, but in actual practice they had developed independently. In the United States both spread quickly, so that by 1920 forty four states, the territory of Hawaii and the federal government had a type of parole, thirty seven states had a type of indeterminate sentence, and only four states had neither. The widespread extension of parole has been attributed to its potential utilisation as a means of administrative expediency. As early as 1925, E. Lindsey, who studied the development of indeterminate sentence and parole, observed that the growth of parole was probably due to the fact that 'the parole system undoubtedly makes prison discipline easier and tends to keep down the prison population',¹⁶⁸. Another

167. Ibid, p.19.

168. E. Lindsey, Historical Sketch of the Indeterminate Sentence and Parole System, J.Cr.L.& Crim., Vol.16, 1925, p.71. He also suggested that 'the object of the system of conditional liberation was stated

recent student of the American experience of parole agrees with him and concludes in the same vein that the capacity of parole to control prison population numbers 'virtually compelled parole authorities to extend its use'¹⁶⁹.

Another factor for the widespread expansion of indeterminate sentence and parole might be found in the fading away of a previous penal practice that largely contributed to prison discipline: convict labour. The penal establishments in America had been smoothly working factories or manufacturing centres; even the 'ideal' prison of Elmira aspired to be self-supporting. However, the 'tornado of labour laws', as McKelvey has called them, upset the industrial settings so laboriously developed and, consequently, destroyed a useful means of sustaining prison discipline in the hands of the authorities¹⁷⁰. Indeterminate sentence and parole can, therefore, be seen as substitute control mechanisms that were also congruent with the basic tenets of the reformatory movement of the period¹⁷¹.

In the end parole lost its reformatory character, if it ever had any, and degenerated to a 'tool' of administrative expediency. Even the Elmira reformatory itself felt strong

to be to help the convict to reform as well as to improve prison discipline but its measure of success as to the latter aim was probably the main reason for its rapid spread', *ibid*, p.60. The same writer found that by 1922 there had been sixteen different types of indeterminate sentences. For an analysis of the history and function of indeterminate sentence see Martin B. Miller, *The Indeterminate Sentence Paradigm: Resocialisation or Social Control?*, *Issues in Criminology*, Vol.7, Fall 1972, pp.101-124.

169. K.O. Hawkins, Parole Selection: The American Experience, unpubl. Ph.D. Thesis, Univ. of Cambridge, 1971, p.57.

170. See B. McKelvey, *op.cit.*, for an examination of the various convict labour systems. See especially Chapter V for contemporary developments in convict labour and the antagonism by organisations of free labour.

pressures to this direction, when after some years of operation the institution was haunted by 'the nightmare of overcrowding'. In spite of constant expansions the reformatory could not catch up with increasing rates of input. In 1889 some 1,500 inmates were accommodated there, whilst the institutional capacity did not exceed 500, with the result that parole was granted indiscriminately to 'reformed' and 'unreformed' to alleviate prison overcrowding¹⁷². In this way, however, it lost even the last shreds of its 'reformatory' nature.

The Decline and Fall of the Reformatory

The decline and fall of parole was symptomatic of the broader decline and fall of the reformatory system itself and its failure to fulfil the promises and achieve the objectives its founders had intended for the 'redemption of the fallen humanity'¹⁷³. After the passing of the first euphoria came the deglamourisation and the realisation that the reformatory more and more approximated common prisons and penitentiaries. The discipline in Elmira varied from benevolent despotism to tyrannical cruelty. When Brockway resigned he had already established the reputation of a 'penal tyrant'. In Elmira, as everywhere else, the inmates 'were walking a chalk-line

171. I am grateful to Martin B. Miller for suggesting to me this point in a private communication.

172. See B. McKelvey, op.cit., M.Grünhut, Penal Reform, O.U.P., 1948 (passim).

173. At the Congress of Cincinnati that marks the beginning of the reformatory movement Brockway, as he recalled later, had an experience 'similar to that of the disciples in the Mount of Transfiguration', while F. Wines finished his speech with the words, 'go down from these heights of social, intellectual and spiritual enjoyment, to toil faithfully, resolutely, persistently in our respective fields of labour, and so fulfil the high mission assigned us by Providence - the regeneration and redemption of fallen humanity'; quoted by J. Mitford, The American Prison Business, London, 1973, p.33.

as surely as though they were in a prison'¹⁷⁴. The systems of grades and marks broke down as reformative devices as they tended to produce 'better prisoners rather than better residents in the community', while indeterminate sentence and parole became powerful means of manipulation. They could hold out hope, as the reformers believed; they could also 'crush a man's spirit', as they actually did¹⁷⁵. The crime rates outside were not stabilised or decreased, but constantly increased. The hope of the penal reformers for an elimination of criminality was finally dashed.

The Social Context of the Reformatory Movement

As we have already suggested, the reformatory movement was not a 'humanitarian' campaign of some 'enlightened' individuals which developed in the minds of its creators and in a social void. Rather, it was an ideological stance which emerged at a particular juncture of American history directly or indirectly determined by the specific development of the productive forces. Viewed from this wider perspective, the reformatory movement, along with similar approaches in various other spheres, constituted part of an ultimately 'conservative' strategy 'of stabilising the emerging industrial order and forestalling radicalism through discriminating intervention into the lives of the weak and the witless'¹⁷⁶. It emerged after the Civil War as a systematic and coherent attempt at studying and solving

174. Osborne Association, Handbook, American Prisons and Reformatories, 1929, p.692.

175. See M.B. Miller, The Ind.Sent. Paradigm, loc.cit., p.101.

176. E. Currie, op.cit., p.45.

the problem of crime and penal treatment through moral and industrial training, inculcation of self-control, industry, obedience and other 'civilised' virtues, or indefinite confinement of those demonstrably unable or unwilling to work in the 'social harness'. The reformatory movement reflected the wider socio-economic dislocations that took place at the second half of the nineteenth century and culminated after the Civil War to determinant features of American social structure: the evergrowing influx of immigrants, and the American Industrial Revolution. The basic tenets of the movement reflected the demands of the dominant system of production for an expanded and skilled industrial labour force, and the demands of the dominant social order for assimilation, absorption and transformation or indefinite control of an increasingly alienated lower class and immigrant population swelling the urban centres of the country.

It is widely agreed among American historians that the second half of the 19th century brought to America its Industrial Revolution which deeply changed the social, economic and political life of the country¹⁷⁷. The factory system obtained its first foothold in North East America - mainly in the textile industry - during the War of 1812, yet until 1850 the bulk of general manufacturing was carried on in the shop and the household by the labour of the family or individual proprietors with apprentice assistants. If the War of 1812 gave birth to the factory system, the Civil War brought about

177. See L. Hacker, The Course of American Economic Growth and Development, N. York, 1970, H.U. Faulkner, op.cit., Wright et al., op.cit.

its domination. The Civil War itself and its outcome were instrumental for the reinforcement of industrial capitalism; this War had been fought between two economic systems, a rising industrial capitalism (north) and a plantation economy (south), or between free labour and slavery. The victory of the industrial North resulted in the domination of industrial interests upon American economy and politics. The unlimited natural resources of the country, the growth of transportation means and especially railroads, the increasing application of machinery, and an easily available cheap labour force combined to make America the leader of the industrialised nations by the turn of the century.

Industrialisation led to increased urbanisation and the creation of an urban industrial proletariat. The total population was increasing by an average 34% per decade and almost doubling every two decades¹⁷⁸. The total urban population living in cities of 8,000 constituted only 8.5% in 1841, but by 1860 this percentage had risen to 16.1 and by 1900 to 32%. During the 1860s the number of industrial establishments increased almost 80%, while the number of industrial workers rose by 57%. Between 1849 and 1889 the industrial proletariat increased from 957,000 to 4,252,000. The rise of a class of wage earners and their concentration in the urban cities led to the growth of the labour movement for better labour conditions, especially in the 1860s. Although the traces of the labour movement are much more ancient, the real impetus to labour

178. For statistical information we have freely drawn from H.U. Faulkner, op.cit., pp.449ff.

organisation was given during and after the Civil War, so that by 1870 no less than 32 national trade unions were in existence¹⁷⁹. The most famous of them were the National Labour Union (1866), National Labour Reform (1872), the Knights of Labour (starting as a secret society in 1869) and others. Their industrial action for the satisfaction of various grievances in the form of strikes, riots, political lobbying, as well as their politicisation and radicalisation brought to the ruling class and the penal reformers the alarm we have already described.

Yet, what disturbed the native population much more was the seemingly uncontrolled influx of foreigners, whom they saw as the source of every social problem and particularly vice and crime. Between 1820 and 1860 the immigration influx had reached 5 millions¹⁸⁰. For all the years between 1820 and 1840 less than 100,000 immigrants had entered the country annually, but after the severe winters in Europe, the famines in Ireland and the revolutions of 1848 and 1849 the figures of immigration for the year 1854 reached a peak at 427,833, to drop again in 1860 to only 153,640. But after the Civil War immigration arose to unprecedented levels: 459,803 in 1873, 788,922 in 1882, 579,663 in 1892 and 1,285,349 in 1907! On the other hand, while during the decade 1851-1860 Britain, Ireland and Germany sent 88% of the immigrants, in 1891-1910

179. For the development of the Labour Movement in America see J. Kuczynski, op.cit., Faulkner, op.cit., Ch.15, 22.

180. For immigration before 1860 see Faulkner, op.cit., p.290-291, for immigration after 1860 see pp.473-476.

southern and eastern Europe took the lead (over 50%); also, while the first waves of immigration consisted mostly of skilled workers, artisans and mechanics, the later waves brought to America an enormous army of hard-working, thrifty but largely unskilled labourers, who combined with the impoverished and miserable Irish swelled the ranks of the lumpenproletariat and became the personification of all social evils¹⁸¹. The core objective of the reformatory - industrial training and inculcation of self-control - must be seen against the background of the social demands and dislocations that immigration and industrialisation had created in America at this historical juncture. Although both these problems were not new, they intensified during this period begging for urgent action. This intensification of social problems together with the failure of previous systems, like penitentiaries and houses of refuge, to tackle the problem of crime led in the field of penal reform to the reformatory movement, as an improved means of reproducing the relations of production, especially a labour force suitable for industrial employment, or checking through 'creative controls' the potential threat of a lower class and alien population.

181. For a discussion of the natives' fear of aliens see R.L. Boostrom, op.cit., esp. Ch.II.

Chapter 6

THE WELFARE STATE AND 'TREATMENT' IDEOLOGY

THE MODERN SYSTEM OF PAROLE IN BRITAIN

Introduction

Parole was introduced in this country as an ideological product of the modern welfare state, and as a pragmatic response to administrative difficulties in the prison system. It was hailed as a radical innovation, but as we have seen it was not new as a method of early release on licence; even in this country other kinds of parole were in existence long before the Criminal Justice Act of 1967. What was new was the fact that, while previous types of parole applied to particular types of imprisonment (Borstal, preventive detention, penal servitude, corrective training and so on), 'release on licence' as it is officially called, applies to all prisoners serving more than a certain minimum. The measure was introduced on governmental initiative, but with the implicit and explicit consensus of all major parties and main penal reform bodies as an expression of the 'rehabilitative ideal' which dominated penological thinking and constituted an ideological hegemony in post war Britain, and as an instance of the contradictions and crises (particularly the fiscal crisis) inherent in the Welfare State (which is fundamentally a monopoly capitalist state). In this chapter, we examine the immediate background of the modern parole system, in other words the ideological climate and the material reality which provided the *raison-d'être* of the new measure. The lack of basic objections of principle, the various suggestions on practical peripheral issues notwithstanding, and the generally warm welcome given to parole, point to the well-entrenched position of 'rehabilitation' and 'individual pathology' in the dominant ideology of modern

Britain, as well as provide an index of the optimism which pervaded the dominant classes not only in regard to the necessity but also to the expected success of parole. Parole being an instance of 'compulsory after-care', the essence and the ideological-political functions of rehabilitation and social work are examined, following a closer analysis of the modern state and its role in an advanced monopoly capitalist society, such as modern Britain.

The Monopoly Capitalist State and its Functions

Ralf Miliband opens its classic book on The State in Capitalist Society¹ with the words: 'more than ever before men now live in the shadow of the state'. This is another way of saying that, although in no epoch has the State remained an indifferent or neutral arbiter in the class conflicts of a society, and in no epoch has the so-called 'free enterprise' system been absolutely free from state interference, it is in our own period that state intervention has assumed an unprecedented character. Through the so-called 'public' sector, the modern state owns, controls and administers a wide range of industries and services, of the most important for the economic life of the modern, advanced capitalist countries. On the other hand, the state is today one of the largest customers of the 'private sector', and some of the major industries could not survive without it, and without the

1. R. Miliband, op.cit., p.3. As it will be obvious in a while the ideas expressed in these sections are largely indebted to the work of Miliband and that of Baran & Sweezy, Monopoly Capital, London, 1966. Also to James O'Connor's The Fiscal Crisis of the State, N. York, 1973 (I used the Greek edition and my references below are to that edition).

various credits, subsidies etc. which it dispenses. In this country, especially after the Second World War, as in many other advanced industrialist countries, state intervention on a scale and pervasiveness immeasurably greater than ever before, also took the form of provision of a vast range of various social services, a fact which is reflected in its title of Welfare State. Various other names are given to this stage of capitalist development such as 'mixed economy', 'post-capitalist societies' or 'state monopoly capitalism'. These epithets are misleading, since, notwithstanding the existence of a public sector in these societies, the largest part of economic activity is still dominated by private ownership and enterprise. The main form in which modern capitalism works is through large economic units of production called monopolies; the economic basis remains essentially capitalist. As Miliband again observes:

Whatever ingenious euphemism may be invented for them, these are still, in all essentials and despite the transformations which they have undergone, authentically capitalist societies².

Also, economic authorities like Baran and Sweezy have amply proved that these societies have reached the latest stage of capitalist development, 'monopoly capitalism', which is basically oriented towards private enterprise. Further, they suggest that, while the role of the State has certainly increased quantitatively, they find the evidence of a qualitative change in recent decades unconvincing. The State has always played

2. Ibid., p.12.

'a crucial role in the development of capitalism' and this role has not changed at this latest stage, or, as they put it, 'under monopoly capitalism the function of the State is to serve the interest of monopoly capital'³. Furthermore, they conclude:

Consequently, the effect of government intervention into the market mechanisms of the economy, whatever its ostensible purpose, is to make the system work more, not less, like one made up exclusively of giant corporations⁴.

There have been some changes in the market relations of the capitalist societies in comparison with an earlier period when competition predominated. Today, the typical economic unit in the capitalist world is not the small entrepreneur or the small firm, but the large scale enterprise 'producing a significant share of the output of an industry or even several industries, and able to control its prices, the volume of its production, and the types and amounts of its investments'⁵. Nevertheless, the corporation, as well as the earlier individual entrepreneur are motivated by the pursuit of profit. The essential characteristics of capitalist relations of production (exploitation, domination, material inequality) remain fundamentally unchanged.

This is not the proper place for an analysis of the economic basis of monopoly capitalism. Suffice it to say that, one of the basic internal transformations in the structure of capitalism from its earlier competitive type is that, while in competitive capitalism there was a tendency of the rate of profit to fall,

3. Baran & Sweezy, op.cit., p.74.

4. Ibid, p.74-75.

5. Ibid, p.19.

as Marx himself observed, in monopoly capitalism 'surplus has a strong and consistent tendency to rise'⁶. This is a law formulated by Baran and Sweezy and confirmed by a more recent Marxian economist, James O'Connor⁷, based on arguments which are outside of our present discussion. This surplus must generally be absorbed, otherwise it cannot be produced, and this happens either through consumption, or through investment, or through waste. It has been observed that modern capitalism has some difficulty in consuming or investing all rising surplus, a paradoxical situation where 'too much' appears as a pervasive problem with broad effects. Hence, the necessity of monopoly capitalism to stimulate demand 'on pain of death', as Baran and Sweezy put it⁸. Hence the sales efforts and the wide variety of ways by which sales promotion is pursued, predominantly through advertising. Surplus is also absorbed by the State, a fact which is of primary importance for our analysis, especially regarding the uses in which this surplus capital is put by the state.

In classical (as well as Marxian) economic theory it was normally taken for granted that the economy was operating in full capacity, so that anything government might take from total output of society would be at the expense of some or all of its members. Since wages were practically irreducible, the financing of the State through taxation fell on the surplus-receiving classes, that is the upper classes. This was one of the fundamental reasons behind the basic suspicion by laissez-

6. Ibid, p.76, 80. For an analysis of this law see ibid,p81ff.

7. J. O'Connor, op.cit.

8. Op.cit., p.116.

faire economists and entrepreneurs of any state intervention, a suspicion which was justified again by reference to the theory of self-adjusting competitive markets. But under monopoly capitalism the economy is not operating in full capacity, it does not utilise fully either labour or productive facilities. The system does not generate enough 'effective demand'. 'If these idle resources can be put to work, they can produce not only necessary means of subsistence for the producers but also additional amounts of surplus. Hence, if government creates more effective demand, it can increase its command over goods and services without encroaching on the incomes of its citizens'⁹. It is at this point that the fact that the state is one of the greatest customers of private capitalism for goods and services can be appreciated. And it is at this point also that the importance of many welfare services, such as those increasing the income and thus the 'effective demand' of the welfare recipients, can be seen. The modern capitalist state not only desires, but can provide social services by absorbing part of the surplus capital created by modern monopoly capitalism. What is important to emphasise is that what the state absorbs is in addition to, and not subtracted from, private surplus; in actual fact 'both the government and the private segments of surplus can and indeed do grow simultaneously'¹⁰. It seems that for this reason, the capitalist ruling class is, if not in overt favour of expansion of state spending and taxing, at least not hostile to the idea. There is no doubt that the state can spend more on social welfare than it could some years ago, and this to

9. Ibid, p.146.

10. Ibid, p.150.

some extent explains the proliferation of welfare measures in this country, especially after 1945. The monopoly capitalist state can spend more, but whether it does spend as well as for what purpose depends on various other matters and reflects the balance of power of the conflicting classes in a society. It is in this sense that the Budget has been characterised as a mirror of the class struggle in a society. According to O'Connor:

...the rate and the composition of the government spending as well as the distribution of the tax burden are not determined by the laws of the market but rather reflect and their structure is determined by the effect of the ¹¹ social and economic conflicts between classes and groups¹¹.

Welfare-Warfare State

The law of the tendency of surplus to rise means that in a monopoly capitalist society the increase of the monopoly sector creates surplus capital which takes the form either of surplus goods (or surplus productive capacity) or of surplus population (relative and absolute). With the increase of the surplus population more and more labourers are compelled to ask for employment in the competitive or public sector. The great supply of labour particularly in the competitive sector means that the semi-employed or employed in this sector along with the unemployed labourers become increasingly poor, and more and more depend on the state in order to cover their needs and supplement their incomes, either directly or indirectly, through the various services of the welfare state.

11. O'Connor, op.cit., p.14.

This leads to an increase in the employment in the public sector, through the formation of new or the extension of old state services. Taken that monopoly capital has a tendency to devour small competitive capital and destroy small entrepreneurs, the result is the creation of a surplus of capitalists as well, who seek employment either in the monopoly or in the public sector.

It is, however, those in the competitive sector who suffer most from the system of capitalist development. The wages are small while the instability and irregularity in the buying and selling of products of this sector parallels instability and irregularity in the labour market. The labour movement is relatively docile, since the social characteristics of the labour force, the number of enterprises in every branch of the economy, the small scale of production and its local character, hinder the organisation of strong trade unions. The conditions of work tend to deteriorate and the rates of unemployment and under-employment to rise. The increasing proletarianisation of the whole population today, the decline of subsistence production and manufacture, as well as of family and community ties, means that, at least this part of the labouring class live in relative impoverishment and turn to the state in order to obtain their means of subsistence, constituting the great bulk of the recipients of the welfare services. The increase in the provision of social services and the increase in military spending are two aspects of the same phenomenon, that is of the general tendency of monopoly capitalism to raise its surplus. Social welfare spending and

military spending are determined by the needs of monopoly capital and by the relations of production in the monopoly sector. As O'Connor observes:

The surplus productive capacity (surplus capital) gives rise to political pressures for aggressive economic expansion abroad. While the surplus of labour force (surplus population) gives rise likewise to political pressures for the expansion of the system of social welfare¹².

It is for this reason that the modern state in advanced capitalist societies has been called a 'welfare-warfare state'. The welfare state tries to alleviate the condition of various problem populations and thus dampen down somehow their protest and resistance potential, while the warfare state tries to ensure domination in markets abroad, increase in the Gross National Product of the country, and therefore in the 'cake' shared by the working classes. This again is likely to lead to a more orderly society, as the experience of the U.S.A. and this country in particular have shown.

From what we have said above, it is clear that the welfare state is essentially a capitalist state, one face of the latest development of capitalism, which is monopoly capitalism. Its function for a capitalist society is the same: to protect the existing social order and ensure the reproduction of the relations of production, that is monopoly capitalist relations. The welfare state developed to serve the functional needs of capital, through various social services likely to ensure not only the stability of the existing capitalist relations, but also the reproduction of a labour power sufficiently healthy, educated, appropriately socialised and well disciplined to

12. O'Connor, op.cit., p.161

take its place in the productive process or submissively take its class location in society. Welfare capitalism emerged as a partial response to the social problems it itself created in order to preserve the long-term political interests of capital, even by sacrificing some of its short-term economic interests through the high scale of expenditure that welfare measures imply.

But the welfare state is not only that. Every state constitutes the arena where the class struggle is taking place, and this holds true for the welfare state as well, which can be seen as a response to working class demands, as a genuine working class victory. Welfare services can be seen as 'concessions coming from capital, the price which capital must pay, in an advanced economy, for its continued exploitation of labour'¹³. They constitute 'part of the 'ransom' the working classes had been able to exact from their rulers....But it did not, for all its importance, constitute any threat to the existing system of power or privilege. What it did constitute was a certain humanisation of the existing social order. As such, it was obviously significant to the working classes'¹⁴. The significance of welfare for the working classes must not obscure its importance as one of its 'de-radicalising' factors. Marxist theorists are well aware that the improvement of the material standards of the lower classes and the provision of social services have contributed very much to the de-escalation and de-radicalisation

13. P. Leonard, op.cit., p.8. (see fn 68).

14. Miliband, op.cit., p.99.

of class conflict in society. They also point to social legislation as a peripheral activity of the state, whose main purpose is to protect the prevailing system of class relations at any time. Yet, as Laski has suggested 'no state can secure the total well-being of a society unless the instruments of production are communally owned'¹⁵. Nevertheless, they agree that welfare and the social reform movement, generally, have delayed the collapse of capitalism. But what is important to argue is that the welfare state, by its very nature, cannot abolish poverty and inequality either in income or in housing or in political power, because to do so would imply that the ruling class has been defeated. The welfare state cannot solve the main social problems, for these are rooted in the class structure of society¹⁶. Hence, the proved failure of the welfare measures introduced after the war to achieve their aims. George and Wilding after examining National Health Service, Education, Social Security and Housing Policy, in other words the pillars upon which welfare state is supposed to stand, concluded that every individual segment and all in combination proved to be a total failure. In their words:

One of the most striking aspects of the development of social policy since the second world war has been the failure to achieve aims which were accepted as fundamental

15. Quoted by V. George & P. Wilding, Ideology & Social Welfare, 1976, .91

16. George & Wilding after discussing the failure of social policy concluded that 'the central element in this failure is the nature of capitalism as a set of values and as an economic system, for the ethic of welfare and the ethic of capitalism are in basic opposition', op.cit., p.ix. For a similar criticism of the failure of the welfare state in America, see I. Howe, The Welfare State, in G. Fisher (ed), The Revival of American Socialism, O.U.P. 1971, p.73: 'Especially in America, the welfare state fails to live up to its formal claims. At best it is a semi-welfare state, at worst an anti-welfare state'. See also Wilensky & Lebeaux, Industrial Society and Social Welfare, 1965 (passim)

in the years between 1944 and 1948. The failure is not failure in terms of the extravagant hopes of optimistic radical reformers or starry-eyed academics. It is failure in terms of the explicit aims enshrined in statute or in the speeches of those responsible for inaugurating or restructuring the services¹⁷.

The Fiscal Crisis of the State and Penal Policy

The failure of the British State to achieve the aims it had set after the war is not irrelevant to the perennial economic crisis of this state, better expressed as a fiscal crisis, which in essence reflects the main contradiction of capitalism, and monopoly capitalism: the contradiction between the social character of production and the private appropriation of the profits, which in monopoly capitalism is expressed through the socialisation of the costs of social investment and social consumption and the privatisation of the profits. This contradiction leads to a 'structural gap' between state spending and state income with the result that the former is increasing faster than the latter¹⁸. The fiscal crisis of the state means that the government is trying always to economise, to have a deficit as small as possible, and, in critical cases, to cut directly public expenditure, as Britain has done repeatedly in the last four or five years. Taken that most services of the welfare state are 'concessions' to the lower classes given more or less unwillingly under real or potential pressure by these classes, apparently these services are likely to suffer more from the fiscal crisis. But of course, this depends at any time on many factors as the nature of the

17. George & Wilding, op.cit., p.106.

18. See O'Connor, op.cit., p.22.

service and the relevant intensity and extent of political pressure exerted by the dominant and the subordinate classes. In any case, the fiscal crisis of the state suggests that opportunities for reduction of state expenditure through the provision of cheaper alternatives, especially in the area of social costs, are largely used by the state and welcome by the ruling class.

Penal policy is strongly affected by fiscal considerations, as we have noted¹⁹. In more recent times two important developments were substantially the result of such considerations, among others: The extensive imposition of fines, and the movement towards what has been called 'decarceration' or the provision of alternatives to custodial measures, of which parole is one example. 'The fine is the most commonly used of all penalties available to the criminal courts', declared A.C.P.S. reporting in 1970²⁰, and they referred to provisional statistics for 1969 that showed that fines were imposed on 95% of offenders who were found guilty of non-indictable offences, 98% of offenders found guilty of non-indictable motoring offences and 89% of those for other non-indictable offences; of indictable offences at magistrate's courts 49% were fined, in higher courts 13%. The fiscal importance of fine, therefore, supposing that it can be finally collected, is obvious, keeping in mind its almost negligible cost as a penal measure.

On the other hand, most of the alternatives to custodial sentences involve some kind of cost, e.g. for facilities in

19. See above, Chapter 2 (theoretical)

20. A.C.P.S. Non-Custodial & Semi-Custodial Penalties, H.M.S.O., 1970, p5.

the community, for wages of supervising and helping personnel etc. What is fascinating, however, about these alternatives to custody is that they are less expensive. It has been taken as an indisputable fact by policy makers and penal reformers that custody costs the state much more than any other measure. The Wooton Committee considered imprisonment as, among other things, 'also a wasteful use of limited resources'. They estimated that 'the cost of maintaining an inmate in a prison service establishment is on the average about £22 a week. No official estimate has been made of the average cost of supervising a probationer but we would judge it to be of the order of £1 a week'²¹. Moreover, the State very likely has to support the family of the prisoner outside, and therefore the actual cost of imprisonment increases. As we shall see below, parole was suggested by many penal reformers as a less expensive alternative to imprisonment, while the White Paper which foreshadowed parole stated that this measure was 'incidentally' a way to relieving overcrowding in prisons, which, of course, included reduction of costs in current and capital investment.

Decarceration has been certainly affected by the growing feeling that prisons have failed to implement the purposes for which they were intended, or otherwise that these institutions are ill-equipped or unsuitable to perform their nominal tasks of rehabilitating their inmates²². But as Scull observes,

21. Ibid, p.3.

22. For the best account so far of the history and recent trends in decarceration see A. Scull, Decarceration, Prentice-Hall, 1977. For an evaluation and critique of Community Treatment Project and Probation Subsidy Programme introduced in California in the 1960s see P. Lerman, Community Treatment and Social Control, Chicago, 1975 Also Briggs, In Place of Prison, London.

decarceration is implemented without 'any scientific certainty in the superiority of a community-based approach', something which renders short-term fiscal considerations as one of the main reasons behind decarcerating policies. In the United States recent years have seen a marked decline in the rate of imprisonment and a sharp increase in the number of persons placed on probation and other non-custodial measures; in California the state introduced in 1966 The California Probation Subsidy Programme, under which it subsidised counties for every offender not sent to prison, while in Massachussets all juvenile training schools and reformatories for delinquents were shut down in an effort to eliminate institutionalisation for young offenders. Britain has lagged somewhat in the implementation of 'diversionary programmes', and the Criminal Justice Act of 1972 made only a few cautious steps in the direction of realising the proposals of the Wooton Committee²³.

The role of the costs in directing penal policy has been explicitly suggested by official bodies, particularly those 'sensitive' to such matters as the Select Parliamentary Estimates Committees. Such a Committee in their Eleventh Report, this being contemporary with the introduction and preliminary discussion on the Criminal Justice Bill that included parole, expressed the opinion that 'an accurate view of comparative costs of individual institutions' by central government was 'the first priority' as 'this is essential not only for managerial control but also for policy making, in as much as one of the criteria that must be taken into account in determining the effectiveness

23. A.C.P.S. (Wooton Committee), Non-Custodial and Semi-Custodial Penalties, H.M.S.O., London, 1970.

of particular types of regime, and of specialised arrangements within a type of regime is the cost factor'²⁴. Their official estimate of the annual average cost per inmate (exclusive of new buildings, maintenance etc.) was, in 1965-66, for prisoners £757, for Borstal inmates £841, for detention centre inmates £897 and for remand centre inmates £840, which gave an overall average cost of £779 per inmate annually²⁵. For this reason they welcomed the introduction of the Bill in the House of Commons and the remarks made by the Home Secretary to the effect that, as a result of the Bill the annual number of receptions in prisons might be reduced by 20%, while the average daily population might be cut down by 10%. They appreciated the Home Secretary's description of the Bill as 'a few determined steps down an escalator which is moving rapidly upwards' and they stressed the need for a more liberal policy of decarceration; a policy of 'taking out of the scope of a prison sentence individuals who cannot possibly benefit thereby, for whom incarceration may not be an appropriate punishment and from whom society is not in serious need of protection'²⁶. They emphasised again the importance of fiscal costs (and social costs at that) by suggesting that efforts should be made to ensure that 'prisons receive only those whose incarceration is essential...(If the number of prisoners) could be reduced it would be an immense saving not only in financial terms -

24. Eleventh Report from the Estimates Committee, Session 1966-67, Prisons, Borstals and Detention Centres, London, H.M.S.O., 1967, p.viii.

25. Ibid.

26. Ibid, p.xiii

the prisons would run more efficiently and more successfully - but in social terms as well,²⁷.

Another area of penal policy where fiscal considerations play an increasingly important role is the provision of some type of productive work for at least part of the prison population. We are far removed from the time when the monotony of prison life was made harder by either no provision of work at all or a wearisome toil of breaking stones or picking oakum. On the other hand, we have not yet adopted, as a single and unreserved end of policy, the earlier American experience of making prisons profitable enterprises. Today work in prison is provided as a rehabilitative measure, but its financial advantages are never underestimated. The Prison Department's policy in regard to work in prison has been made explicit in various documents. In one of their memoranda²⁸ they justified work in prison on two accounts:

This policy is to give prisoners industrial training and experience which will best fit them to get and keep jobs on discharge; and to make good economic use of the prison labour force...To a very considerable extent these two objects can be reconciled, and in general both can be served by improving the efficiency of prison industries..

In a later document²⁹ they were delighted to report that 'the financial returns from prison industries as a whole have shown encouraging improvement. The value of production is rising.. The trading results are also improving'. They went on reporting that in the past prison industries always made a loss, which

27. Ibid, p.xiv

28. Memo, submitted by the Home Office to the Est. Comm.11th Report, p.199

29. People in Prison, H.M.S.O. 1969, p.28.

reached about £750,000 in 1966, £450,000 in 1968, yet in 1969 it had lowered to £350,000. They expressed the hope that the immediate aim of the Government was 'to turn the loss into a profit of £400,000 by 1972'. Whether this hope was realised or not is not of primary importance for us at this point. We have referred to prison industries in order to underline two things. First, that the fiscal crisis of the state works not only in a negative sense (to save costs), but in a positive sense as well; the state is trying to achieve as much self-sufficiency in its institutions, and thus cover as much of its social costs, as possible. The second issue relates more closely to parole and points to the strong pressure on the system of early release exercised by the need of some institutions to go on functioning in the pre-arranged way. It seems that the overcrowding which existed in the English prisons in the late 1960s created a paradoxical situation, in which, on the one hand, there was a desire to promote and expand the industrial potential of prisons - this necessitating a certain level of population - and, on the other hand, a parallel desire to empty prisons through the way of parole and other measures. As we shall see below, parole was envisaged and subsequently implemented rather as a mechanism of controlling prison population pressures, than as a penal measure aiming at the 'extermination' of prison altogether, and this was an effect of the ambiguous and multi-purposed content of parole.

Welfare State and Parole

Parole was originally conceived as a 'new measure' applying to carefully selected prisoners suitable for early release. The

criteria for such a selection were never clearly described, but a major assumption in parole philosophy related to the prisoner's likely response to 'generous treatment' provided by the State at a particular moment during imprisonment. As we shall see, such a likelihood is destined to be highly impaired by the fact that parole was grafted on a determinate prison sentence; nevertheless, the optimism remained that if generous help and assistance, not only of a material character, were given to specially selected prisoners, they might benefit, stop re-offending and return to 'decent citizenship' after release. Parole thus was envisaged as a practical expression of the positive attitude of the modern State toward the problems of prisoners and other categories of criminals, which was part of its welfare policies concerned with the 'management' of the underprivileged and 'problematic' populations in society. Parole was inspired with the air of optimism which pervaded penal administrators and legislators in the pre- and, especially, post-war years. However, parole reflected also a feeling of pessimism regarding penal institutions. Emphasis was no longer laid on longer detention as an opportunity for better training. One of the main justifications of parole was that long periods of imprisonment had deteriorating effects, and that parole should be used to prevent or eliminate them³⁰. Parole thus constituted not only a measure of 'economic expediency', but a 'new measure of treatment' as well. It reflected an ideological shift from naked retributive punitiveness towards more 'constructive' methods of dealing with criminals

30. Labour Party's Study Group (Longford Committee), op.cit., p.46.

in the community, a shift away from 'punishment' as a social right towards 'rehabilitation' and 'treatment' as a social responsibility, a shift away from negative 'segregative' means of control towards more positive 'integrative' methods of assimilation and rehabilitation of problem populations:

The rapid changes made in our society, its organisation, its values and its pressures, tax the most adaptable of us at times; we have a responsibility to provide special care and facilities for those who cannot so easily fit into new patterns of living; only if we fulfil that responsibility can we expect the co-operation of those who turn against society in frustration, anguish and anger³¹.

This statement expresses the ideological shift well, and so does the Longford report which first aired parole:

The obligations of each citizen to society are matched by the obligations of society to each citizen. A society which fails in its obligations to many of its citizens must not be surprised if some of them do not keep its rules³².

The same report expressed the wider context within which parole as a rehabilitative measure was expected to work, as well as emphasising the 'positive' aspects of penal policy:

The object of our penal system, therefore, cannot be merely to punish, teach the criminal a lesson, make him expiate his offence - and set him 'free' again to prey on society.

Although society may be justified in demanding a measure of retribution to deter the criminal, this is a negative approach. Something more is needed for the true protection of the citizen: the prevention of crime by the care of the inadequate and immature, the healing of the sick, the rehabilitation of the offender, the restoration of his self-respect and his training in respect for the rights of others. These are the positive aspects of penal practice and penal reform³³.

In the same vein, the Fabian Society in its memorandum expressed their conviction 'of the sterility of the punitive-retributive

31. R.C.P.S., op.cit., vol.ii, p.252 (Memorandum by Quakers, my emphasis)

32. Longford Committee, op.cit., p.4. (my emphasis)

33. Ibid, p.6 (my emphasis).

attitude' which prevailed at the time; they would like to see penal institutions 'turned into genuine treatment centres where residents would receive individual attention, and where treatment would be flexible and aimed at the maximum of continued integration of the young persons concerned into society and into their families'³⁴. Again, the Longford Report, disapproving of the 'popular' idea of crime prevention as 'negative' suggested that what was necessary, 'and in the long run likely to be more effective', was a 'positive, constructive policy for tackling the problem at its roots: by social measures designed to remove or reduce the factors which pre-dispose people to crime; and by methods of treatment that will help the offender to overcome his handicaps or disabilities and strengthen his will to reform'³⁵. Later on they repeated that 'the long-term protection of society includes the reform and rehabilitation of offenders'³⁶. And they concluded:

If a prison sentence is to serve any useful purpose it must, as has been already stressed, aim at the rehabilitation of the prisoner and his return to society equipped for responsible citizenship. After-care must, therefore, be simply a continuation of the concern for the welfare of the prisoner - and his family, if he has one ³⁷that should have operated from the moment he was arrested³⁷.

What is needed by many ex-prisoners on their release is not just material help - a set of clothes, a place to live, a job to do. Above all they need understanding, friends, who will accept them unpatronisingly as they are, take them into their own homes as welcome guests and generally help them to put down roots³⁸.

34. R.C.P.S., op.cit., vol.ii, p.93 (my emphasis).

35. Longford Committee, op.cit., p.12.

36. Ibid, p.43.

37. Ibid, p.58.

38. Ibid, p.60.

Moreover, rehabilitation of the criminal was not considered to be only an individual matter; it was also a means of broader social reconstruction, along with other ameliorative, piecemeal social reforms, in true Fabian style³⁹.

What is needed, therefore, is a mobilisation of the whole community in a new drive for the positive prevention of crime, and an understanding by the whole community that the enlightened treatment of offenders is essential both for this limited but important end and for social progress in its widest sense⁴⁰.

Rehabilitation of the criminal, therefore, was the core ideological justification of parole.

The aim of 'enlightened treatment' was double; to reform the individual offender and simultaneously constitute a means of social-engineering. As in traditional criminology the social structure was conceived as a series of fragmented instances, and social problems as mediated through the individual, so that ameliorative policies directed to the former might have immediate effects on the latter, and vice versa. The proponents of rehabilitation acknowledged some criminogenic sources in the community at large, but individualised in the last analysis the social reality of crime. Therefore, they wanted penal intervention by the State to be part of a social policy, yet to operate at the level of personal transformation. In the context of welfare ideology it is obvious that the emphasis is laid by the state on the conditional

39. 'It is to the solution of their (offenders) problems that our crime prevention programmes must be directed - in the home, where problem behaviour has its roots, in the schools, often ill-equipped to deal with it, and in the community at large', ibid, p.11.

40. Ibid, pp.70-71.

and supervisory element of parole, although early release alone is seen as beneficial in its own right. It is the services and help provided after release, 'the generous treatment' provided through compulsory after-care which constitutes the essence of welfare penal practice, to a discussion of which we turn now.

After-care and the Rehabilitative Ideal in the Welfare State

Parole has been historically integrally bound up with compulsory after-care. We have already noted that many categories of young and adult prisoners received compulsory after-care especially after the Criminal Justice Act of 1948; Borstal trainees, young prisoners under 21 imprisoned for more than 3 months, corrective trainees, Preventive Detainees and Lifers. Before 1948 only Borstal, penal servitude and preventive detention of the old type were connected with compulsory after-care⁴¹. Of course, after-care is a wider concept than parole, as it can ideally apply to every prisoner after the expiration of the sentence ('after' care), but in all cases where compulsory after-care had been provided the release had been on licence. The Criminal Justice Act, 1961 extended the provision of compulsory after-care to some other categories of prisoners, but due to economic difficulties these provisions were never implemented. It has been suggested that parole may be partially seen as the end product of the

41. For an outline of these earlier cases of compulsory after-care see A.C.T.O., The After Care and Treatment of Discharged Prisoners, H.M.S.O., 1958.

post-war welfare policy of providing compulsory after-care to more and more categories (and numbers) of prisoners⁴².

It is worth noticing that A.C.T.O. reporting on the matter in 1958 pointed out that the main principle guiding them in their considerations was that 'the first extension of compulsory after-care should be directed to those prisoners who are in special need of guidance and help on release and are likely to be diverted thereby from further crime'⁴³. The same considered that 'the primary object of compulsory after-care' was 'the prevention of crime'. The prisoner would 'find it easier to avoid lapsing into criminal ways if they accept guidance and help on release'. After-care seemed to them 'a necessary complement to the training in prison ... when that training is tested in free conditions'⁴⁴. Compulsory after-care was supposed to mean supervision in the community and conditions imposed on the licence, in contrast to the voluntary after-care which was provided only to willing prisoners without any condition or restriction. The Scottish A.C.T.O. reported along almost the same lines. They suggested that 'the aim of after-care is no doubt to protect society by helping the offender to re-establish himself so that he does not fall into crime again'⁴⁵. What is important in both documents is that while both emphasised the importance of compulsory after-care for preventive purposes they also suggested that it was not feasible for practical reasons or indeed not necessary that

42. R. Hood, Some Fundamental Dilemmas, in D.A. Thomas(ed), op.cit.

43. A.C.T.O., op.cit., p.17 (our emphasis)

44. Ibid, p.10-11.

45. Scottish A.C.T.O., op.cit., p.10.

such a scheme should operate for all prisoners without exceptions. For this reason they suggested it on a selective basis, but not along the lines parole operates. As we have already seen they rejected such an option, but even today the selective basis remains nevertheless. They underlined the wider aims of after-care in this way:

Positive after-care is not just a matter of finding a man a job and leaving him to fend for himself thereafter. It must involve building up an understanding relationship between the after-care officer and the discharged person so that it may be possible for the latter to regain confidence, or develop new confidence in the only context possible - a personal one..⁴⁶

Finally, the English A.C.T.O. expressing the welfare character of after-care suggested that it should be given to those 'who most need after-care and those who are more likely to profit from it' (our emphasis)⁴⁷.

The same A.C.T.O. reporting on The Organisation of After-Care, (1963) thought that compulsory after-care 'has the double object of rehabilitation and supervision'⁴⁸. They accepted, furthermore, as a first principle of after-care, that it 'should be designed to meet the needs both of society and of the offender. The most elementary requirement of society is to guard against a relapse into crime by those offenders whose previous history suggests that this may be a serious risk, particularly in the difficult period immediately after discharge'⁴⁹. A few paragraphs later they concluded that 'the primary function of any system of after-care must be the rehabilitation of the

46. Ibid, p.16.

47. Op.cit., p.13.

48. A.C.T.O., The Organisation of After-Care, H.M.S.O., London 1963, p.2.

49. Ibid, p.3 (our emphasis).

discharged offender'⁵⁰. They thought of it as a special form of social work, and conceived of it as 'a process which starts on the offender's reception into custody, is developed during his sentence, and is available for as long as necessary after his release'⁵¹ (the so-called 'through-care'). They reiterated once more that after-care should be applied 'according to individual need'⁵²; finally, they analysed the function of after-care in the following terms:

More is required of the community than the provision of material help. While a person about to be discharged from a penal institution needs to have deficiencies in clothing made good and to be given immediate financial aid, these provisions are incidental to the main task. The prime purpose of after-care in the community is to offer the discharged prisoner the friendship, guidance and moral support that he needs if he is to surmount the difficulties that face him in the outside world. Those difficulties are often of a personal or domestic nature; they have sometimes contributed to his former delinquency and may impede his full and lasting readjustment⁵³.

Another official document published after the introduction of parole emphasised again the continuation of this approach to those suitable for release on licence. It pointed out that 'for them release on licence represents an important stage in the process of rehabilitation, a stage during which an offender who would otherwise be still in prison is assisted to resettle in the community with the help and supervision of a probation officer'⁵⁴.

50. Ibid, p.4 (our emphasis).

51. Ibid, p.4.

52. Ibid, p.29 (our emphasis).

53. Ibid, (our emphasis)

54. People in Prison, England and Wales, H.M.S.O., London 1969, para. 116.

Parole Supervision and Social Work

Another aspect which bridges the above with the welfare state concerns the function and work of the probation officers (and social workers generally) in supervising parolees and, more generally, in mediating between the State and the criminal population or their immediate social environment.

In a document of the N.A.P.O., published in 1966, I. Miles defined the responsibility of the probation service as that which is concerned with 'the reformation and rehabilitation of the offender'⁵⁵. He thought that probation officers were suitable for the after-care of discharged prisoners as well as for probationers. He defined after care, ideally, as 'the help given to a discharged offender, within a relationship with a skilled social worker, in order that the offender might achieve a satisfactory adjustment with society after his release from custody', while statutory after-care 'gives the supervising officer authoritarian sanctions and it therefore has deeper implications than merely helping a discharged offender in his rehabilitation'. He stated its aims as twofold: 'Supervision supported by the sanction of recall, and rehabilitation'. He even thought that some might feel that such sanctions 'have no part in casework', but he continued 'it has been argued that with recalcitrant offenders such a sanction can be used constructively and therapeutically because it confronts them with a reality situation and sets realistic limits'. He added

55. I. Miles, Probation and After-Care, N.A.P.O., London 1966 (the emphases are mine). I have found this slim document one of the best illustrations of positivist criminology and individual empiricism and, therefore, I have heavily drawn from it illustrative quotations relevant to our discussion at this point.

'there is no doubt however that the better the casework relationship between worker and client, the less will be the relevance of sanctions'. He estimated that 'the rehabilitation of the discharged offender into society depends on the way his needs are dealt with on his release'. Immediate practical needs, emotional needs, the prisoner's feelings of anxiety or stress, of 'any difficulties within himself'. 'This is how probation officers see after-care. Protection of society is incidental; the main concern is the rehabilitation of the offender. After-care is regarded as an attempt to get to the real need of the ex-prisoner, which is to be accepted into society and to recover his place into society'. Finally, in suggesting the inherent dilemma in statutory after-care he notes that 'the person responsible for after-care, however, is expected to be a representative of the community's desire to keep the offender under supervision lest he commits further offences and also of the community's sense of responsibility for helping him to recover his place in society'.

This document well represents the 'individual pathology' model of the welfare ideology dominating post-war Britain, and clearly illustrates the social and historical vacuum within which probation works⁵⁶. Unfortunately, this atheoretical, unhistorical and unproblematic acceptance of probation work characterises many academic studies as well. So, Jones writes that the probation officer should have 'the kind of influence

56. For a good analysis of the problems of the 'treatment ideology' see Bean, Rehabilitation and Deviance, London, 1976.

which will change the individual's life to the extent that is required to turn him from a criminal into a law-abiding citizen',⁵⁷. Professor Parsloe writing about ^{the} probation officer's authority suggests that 'authority is given for the purpose of re-establishing the offender in the community and preventing further offences',⁵⁸, and that in probation work 'the ultimate task is the rehabilitation of the offender in society',⁵⁹. The Morison Committee saw the probation officer 'essentially as a professional caseworker, employing in a specialised field, skill... while ... his main concern is with the well being of an individual, he is also the agent of a system concerned with the protection of society and as such must ... seek to regulate the probationer's behaviour ... one of the probation officer's tasks is to help him (the probationer) to perceive that ... his (the probationer's) interests and those of society are identical',⁶⁰. Another official document stated, as the deeper purpose of probation, 'to help the probationer to develop qualities which will enable him to adjust to the demands of society and to become and remain a happy and useful citizen',⁶¹. Another quotation gives a clearer picture of what is thought of probation and its objectives:

The professional practice of probation is directed towards the achievement of more permanent goals than inhibition

57. H. Jones, Crime in a Changing Society, 1971, p.131.

58. Ph. Parsloe, The Work of the Probation and After-care Officer, 1967, p.28.

59. Ibid, p.31 (our emphasis)

60. Report of the Depart. Committee on the Probation Service, (Morison Comm), H.M.S.O., London, 1962, para. 54.

61. The Probation and After-care Service in England and Wales, H.M.S.O., 1973, p.6. (my emphasis).

under authoritative restraint of criminal or otherwise anti-social conduct during the limited period of recognizance. The techniques of intensive casework counselling and resource to general community resources are exploited to their fullest extent in an endeavour to develop within the probationer those qualities of character and personality which lead to the permanent assumption of a stable and responsible manner of living⁶².

But as Ph. Bean observes 'irrespective of the possibility of achieving these goals, there is in this definition a whole series of moral judgments, not the least that stability and responsibility are to be seen as ends in themselves... The probation officer likewise when requiring stability and responsibility for his client is acting as an agent of the status quo'⁶³. The same author discussing the concept of treatment asks: 'To be rehabilitated means that an offender is fit to take place in the world again, but whose world is this? Presumably the world of the independent, career orientated, happily married, tension free professional, not the world of the hobo, drug addict, criminally deviant or activist revolutionary'⁶⁴, which is another way of saying that individual rehabilitation serves as an ideological mystification of the social and political 'reality' of crime. It is to the ideological functions of rehabilitation to which we turn now.

The Ideological Functions of Rehabilitation

The 'individual pathology' ideology which permeates penal ideas and practices is well exemplified in the following quotation from a document mentioned above. It discusses the

62. Jarvis, Manual of Probation, London, 1969, p.40 (our emphasis).

63. Ph. Bean, op.cit., p.54.

64. Ibid, p.61.

theoretical basis of probation and after-care within the context of this ideology:

they (the probation officers) know that the personality can, for any number of reasons, many of which are beyond the control of the individual, be disordered or become sick or become for the want of a better word, maladjusted; they also know that a sick or maladjusted personality can be treated and that attitudes and behaviour can be modified, if not changed completely. Probation officers realise, and the general public is slowly coming to realise, that the commission of an offence by an individual is one form of social breakdown and is frequently the manifestation of something deeper or more complicated than the mere wish to satisfy an immediate desire or temptation; it is frequently only a symptom of a deeper disturbance or defect, and those dealing with offenders recognise the importance of trying as far as practicable to deal with the cause rather than the symptom, although this is not always feasible. Not enough is known about delinquency, but it is known that it has a great deal to do with environment, particularly with the family and with personality, especially with the individual's ability to relate to others. Probation work consequently has developed along casework lines in which an attempt is made within the relationship between the officer and the offender to help the offender to achieve a better adjustment between himself and his environment⁶⁵.

Wider problems of social structure are not discussed and never mentioned in this or similar references. What is wrong involves only the individual offender or perhaps his immediate environment, as the family, but again in close connection with the individual, not the social, economic or political conditions which surround him. Hence, the belief that society is intrinsically good and all efforts must be devoted to modifying, if not changing, individual behaviour, so as to enable him to return, to adjust to his social environment. As we have already noted in Chapter 2, rehabilitation aims at making the individual fit his social position in an unequal and class divided society. It is in this context that 'rehabilitation',

65. I. Miles, op.cit., p.11-12.

for a Marxist criminology, is seen as an overtly political act, for it attempts to reconcile the offender to the existing economic, social and political system. As Barry Wilkins observes in a recent paper:

The underlying assumption ... is that in the conflict between society and the client, it is the client who is the real problem. The client does not fit into society and therefore he must be fitted-in, re-established or rehabilitated into society. The view is rarely considered seriously that there might be some fault in the structure of society which is the real root of the problem - that there might be some fundamental deficiency or inadequacy in society which requires modification or reform⁶⁶.

But, as he continues, 'whether or not the existing economic, social and political system is acceptable is an issue which depends very much upon the social and political viewpoint to which one is committed. It is, in fact, an explicitly political issue'⁶⁷. Therefore, any attempt to deal with crime at the level of individual pathology distracts attention from the political context and depoliticises the essential nature of penal intervention as a direct political act legitimating state oppression, which is in the last analysis, as we have seen, class oppression. The problem is individualised in order to avoid defining it in class terms. This is the role not only of probation officers but of social work in general. Professor Leonard wrote that:

Fundamentally, the ideological role of social work is to reproduce definitions of 'problems' which avoid reference to the basic structural features of the capitalist mode of production. In particular, such basic features and the injustice, inequality and exploitation which flows from them must be, in Marx's

66. B. Wilkins, The Morality of Law and the Politics of Probation, in Timms & Watson (eds) Philosophy in Social Work, London, 1978, p.136.

67. Ibid, p.137.

terms fetishised, that is seen as part of the natural order and therefore impervious to change⁶⁸.

Rehabilitation means trying to change the character of the individual offender, to make him more contented with his lot in life. As the Morison Committee reported, it should help him realise that 'his interests and those of society are identical'. Probation work and parole supervision, therefore, are powerful ideological legitimising forces of the state in its attempt not only to protect but also to perpetuate some of the kinds of inequality and injustice inherent in the capitalist society.

So far great emphasis has been laid on the rehabilitative aspect of parole supervision, to almost total ignorance of the repressive nature of the supervision apparent in the existence of strict conditions relating to behaviour, residence and way of life, and the possibility of recall for the commission of a new offence or the transgression of any of these conditions of licence. Having discussed this aspect in the previous chapters, particularly in connection with the Irish Convict system, we shall not analyse it again here, especially since the repressive element of parole has not changed in practice very much since then. The type of conditions, the possibility of recall and the actual process of revocation are almost the same. The supervising personnel has surely changed; it has been formally organised in a hierarchic bureaucratic profession, but its scope and objectives are similar: to control and check the parolee in the community, to see that everything is

68. P. Leonard, State, Class and Welfare, The James Seth Memorial Lecture, 1978, (unpub. paper), p.8.

going well with him according to the pre-agreed conditions, and finally to bring him back in prison in case he misbehaves or shows signs of unfitness to adjust in the existing conditions outside. This role, however, transforms parole officers into law-enforcement officials, like the police. Many writers have analysed the dilemmas inherent in the double role of probation officers as law enforcers and welfare agents, but some see no difficulty in helping and controlling at the same time. So, Monger believes that people with various problems

...will look not only for the professional equivalents of love but also for that control, security, authority, which in other and happier times they may have found either within themselves or available from outside⁶⁹.

In his words, they seek a 'benevolence within authority'⁷⁰. Now this is in line with the idea such writers have about criminals, and consistent with the whole rehabilitative ideal as the dominant element in penal policy, but at the same time it is the clearest picture of the ideological inversion which traditional penology has been able to achieve in its 'scientific' adventures. Not only did it take the criminal out of his social, political and class context, not only did it reduce him to an unfortunate 'homunculus', defected, maladjusted etc., but also it did find him in need of authority and control by the State

69. From the general works on probation and parole touching these issues there are many specific studies. From the older ones see L. Ohlin et.al., Major Dilemmas of the Social Worker in Probation and Parole, in N.P.P.A. Journal, V.2, July, 1956; Shireman, Casework in Probation and Parole, Fed. Prob., 27, 1963, pp.51-57. From the more recent ones see R. Hauge, Institutional Dilemmas in Probation and Parole, in Scand. Stud. in Crim., Vol.2, 1968; E. Studt, Surveillance and Service in Parole, Univ. of Cal., Los Angeles, 1972. For a criticism of Parole Supervision see the Epilogue of this thesis.

70. Monger, Casework in Probation, London, 1964.

and its agents! The class nature of crime and punishment is obscured and the penal intervention by the State which, as we have seen, is one of the ways by which dominant class interests are secured, is interpreted as 'benevolence' earnestly sought after by its victims. It is within this ideological context that parole was proposed and actually introduced as a 'new measure of treatment'. The 'rehabilitative ideal' was so well entrenched in modern British ideology and penal policy that parole as an instance of welfarism and rehabilitation found its place in the statute book through almost universal consensus. It is with the analysis of the historical background of the modern system of parole that we propose to close this chapter.

Historical Background of Modern Parole

A.C.T.O.

In this section we shall examine the immediate background of the modern system of parole, in other words the way in which the provision for an early release on licence found its place in the statute book. As usually in the British experience, parole was introduced as an ad hoc pragmatic measure of penal policy without pre-established foundation on criminological theory, and, importantly, without the suggestion of the Advisory Committee on the Treatment of Offenders; one might say, in spite of their dislike of an indeterminate element in the sentence of preventive detention, and in spite of their explicit disapproval of early release of prisoners after selection by penal administrators⁷¹. As a matter of fact parole was aired firstly in the report of the Labour Party's

Study Group⁷², and in a governmental White Paper⁷³. Another point to emerge is the fact that not only did the Criminal Justice Act of 1967 pass as a non-party legislation and without any major antagonism in Parliament, but also parole itself was given a warm welcome from all quarters in both Houses.

We shall describe first the attitude of A.C.T.O. to the policy of early release in preventive detention. They published their report in 1963, just two years before the White Paper and only one year before the Longford Report⁷⁴. It is worth noting that in preventive detention early release took place for those in the third stage after two thirds of the sentence had been served, while for those not in this stage after five sixths of the sentence. These were the official minima for eligibility; the actual release depended upon the recommendation of the Preventive Detention Advisory Board. The Committee admitted that the English administration had never favoured the system 'taking the view that its theoretical advantages were outweighed by its practical disadvantages, in particular its unsettling effect on the morale of the prisoners'⁷⁵. They recalled that in the experience of the 1908 system early release broke down and became in practice a means of automatic release

71. The same happened with the suspended sentence, which was introduced in 1967 as well. This policy was twice characterised by A.C.T.O. as 'wrong in principle' and impractical, but nevertheless it became law. For the 'pragmatic' nature of British penal policy see our Ch.1 above, where further references. For the case of suspended sentence see R. Hood, *Criminology and Penal Change*, in R. Hood(ed), op.cit.

72. The report (Longford Report), Crime, A Challenge to us All, London, 1964.

73. White Paper, The Adult Offender, H.M.S.O., 1965.

74. A.C.T.O., Preventive Detention, H.M.S.O., 1963.

75. Ibid, para. 34.

after three quarters of the sentence, subject to good conduct. The Prison Rules of 1949 attempted to make the best of both worlds:

Under a completely indeterminate system, the prisoner never knows the thing which above all interests him; that is, when he will get out. Under the present system at least he knows that he can expect to serve five sixths, and if he is lucky two thirds, and he knows this some years before he is actually due to go out⁷⁶.

A.C.T.O. also observed that the prisoners tried to impress the Board with their behaviour in prison, whereas they failed to understand that 'the primary consideration before the Board is not their behaviour in prison but whether they are likely to keep out of trouble on release'. It is characteristic that only 17% were on average promoted to the third stage. Finally, A.C.T.O. took it as an unfortunate feature of the system both on the prisoners who failed, to whom it created 'severe psychological reactions', and on the prisoner's family. The Committee referred to instances where 'wives, who hitherto remained faithful, desert their husbands on being told that they were to remain in the second stage'⁷⁷. And they concluded:

We are in no doubt whatever that the selection of a few prisoners for promotion to the third stage, while the great majority remain in the second stage, is one of the most unsatisfactory features of the preventive detention system... this more than any other aspect of the sentence was a cause of unrest and bitterness⁷⁸.

Needless to say, the practical implication for those not selected for the third stage was that they were losing the difference

76. Ibid, para. 34.

77. Ibid, para. 35.

78. Ibid, para. 36.

between two thirds and five sixths, or one sixth of the whole sentence; therefore, the quoted comments were implicitly turned against the system of early selective release as well. As far as recidivism is concerned A.C.T.O. studied all the preventive detention cases from 1955 up to the end of 1961. By then 49% of those released during this period and 60% of those released before 1959 were reconvicted. They found no significant difference between the men who served two thirds or five sixths. It was thus apparent, according to A.C.T.O., that the Boards were unable to differentiate a good risk from a bad one. The Chairman of the Boards admitted that their decision at the end was basically a hunch 'and often a majority hunch at that'⁷⁹. The lack of explicit criteria is a situation which even the modern parole Board has been unable to tackle. The Committee reported in favour of the abolition of the sentence of preventive detention and as an interim measure they suggested that all preventive detainees should be released, subject to good conduct, after serving two thirds of the sentence, on licence, with the possibility of recall until the expiry of the sentence. In this way, they recommended the actual abolition of the P.D.A. Boards⁸⁰, as there would be no function for the Boards to perform, since the promotion from the second to the third stage would no longer arise. Yet the subsequent history of parole showed that what A.C.T.O. rejected from preventive detention was introduced as 'a radical innovation' in the parole system of 1967.

79. Ibid, para. 37.

80. P.D.A. Boards = Preventive Detention Advisory Boards.

Again in an earlier report⁸¹, A.C.T.O., discussing various ways in which the selection for the provision of compulsory after-care was to apply, rejected the suggestion made for a form of 'case committee' consisting of such persons as a Prison Commissioner, the prison governor, the prison chaplain, a prison visitor and a visiting magistrate. They argued that:

Recent experience suggests...that selection of this kind within the sentence imposed by the courts is likely to cause a most resentful and invidious atmosphere in prison which would impair not only the success of any new scheme of compulsory after-care but also the training that is given in prison⁸².

This was going to happen whether the period of licence was regarded by the prisoners as an additional imposition or as an advantage. They expressed their understanding that the current method of selecting preventive detention prisoners for release after two thirds rather than five sixths of their sentence was thought by the prisoners to be unfair, even though the selection was made by an independent advisory board. As things stood then, they considered that selection of prisoners by prison officials, 'however their experience and however much information they have about an individual prisoner' might be proved impossible. They did not find themselves able to recommend this method of selection having considered the great difficulty of the case committee to make 'a sufficiently accurate forecast of the prisoner's needs in the completely different world outside prison to justify a decision to impose statutory after-care being based upon it'⁸³.

81. The After-Care and Supervision of Discharged Prisoners, H.M.S.O., 1958

82. Ibid, para. 31.

83. Ibid, para. 33.

In the same way the Scottish A.C.T.O., reporting in 1961 and admitting the need for a kind of selection for after-care, concluded that 'at present the one that is most satisfactory is the application of compulsory after care to categories of inmates and prisoners clearly specified in statute'. They rejected selection by prison officials, since if 'the basis of selection would be in the main the prisoner's conduct and progress while in prison, there might be a tendency to choose the man who simply avoided getting into trouble'. They thought also that this would be likely 'to create discontent among the body of prisoners to have the prison staff, or any board acting on their advice, choose certain men as apparently better, or worse, post-release risks than others'. Finally, considering that 'the Governor and his staff would be inclined to avoid the invidiousness of selection by recommending almost every prisoner or none' they concluded:

Placing the ultimate decision for selection on the Secretary of State might appear to remove the onus from the prison staff or prison board. The Secretary of State, however, would have to rely on reports from the prison and welfare staffs and sooner or later this would be known to the prisoners. All the undesirable consequences of selection would still remain⁸⁴.

Yet, the new system of parole was based on exactly this basis of selection - of course not at the stage of the parole Board, but in the preliminary stage of the actual filter of the Local Review Committees who select the *prima-facie* good risks and make their recommendations.

84. Scottish A.C.T.O., The Extension of Compulsory After-Care to Additional Categories of Inmates and Prisoners, H.M.S.O., Edinburgh, 1961, para. 25.

The Two Major Parties

Parole was foreshadowed, one year before the publication of the White Paper, The Adult Offender, in the report on penal policy of the Labour Party's Study Group. Reporting in June 1964 the Study Group reminded themselves that, in Borstal sentences, although the sentence was no more than two years, the Prison Department could release any Borstal trainee under supervision after he had served at least a quarter of that period. Based on this, they recommended 'that the Home Secretary should appoint a Parole Board, with one or more representatives of the judiciary upon it, with similar powers in relation to any sentence of imprisonment',⁸⁵ (our emphasis). One is struck not only by the name of the new body (in view of the subsequent controversies especially in the case of the House of Lords), but also by the courageous expansion of the provision of parole to all sentences of imprisonment, something which was really new⁸⁶. They also suggested that 'this Parole Board should have the fullest information from the Prison Department about individual cases, and a staff able to report adequately on the results of previous decisions, so that reliable forecasts can be made',⁸⁷. No further information is included in this report about the workings or the function of the new body. Taking into consideration that the proposal for the extension of early release on licence follows directly

85. Op.cit., p.44.

86. It is worth remembering that A.C.T.O. was in favour of compulsory after-care of specific categories of prisoners and not for all. See both reports cited in the previous section.

87. Ibid.

the following paragraph, we are made to believe that this might have constituted the primary justification for the Group's proposition:

We doubt the value of keeping men in prison after they have learned their lesson; at this point the cost of continuing to keep them in prison is no longer justified⁸⁸.

We shall see below the extent to which cost considerations were instrumental to the introduction of parole.

On the other hand, the report of the Conservative Party's Group was published just one year after the White Paper⁸⁹. They considered that the power the Home Secretary had to release on licence a 'life' prisoner, but not other prisoners, i.e. those serving a determinate period, was 'unsatisfactory'. Referring to the new proposals made in the Government White Paper they aired their fear that:

This seems to us to remove altogether too much power from the judiciary to the executive, and might indeed lead to the practice of imposing very long sentences in order to secure what the trial judge considered a reasonable period in prison⁹⁰.

They arrived at a twofold conclusion. 'First, the power of the Home Secretary to release prisoners on licence should be extended to include all prisoners serving long determinate sentences. Secondly, in no case should he release on licence without obtaining the view of an advisory body to include representatives of the judiciary, appointed for that purpose'. They believed that to be 'the best way of resolving a situation in which the executive, the judiciary, the prisoner - and the

88. Ibid, p.43.

89. Crime Knows No Boundaries, Conservative Political Centre, London, 1966.

90. Ibid, p.29.

least the public - hold a strong interest'⁹¹.

From the laconic remarks of both reports one cannot get a clear idea of the underlying philosophy, but one can establish the fact that both major political parties of this country were in favour of the extension of early release on licence to all sentences of imprisonment, and not to particular categories of prisoners. Both parties were in favour of selection of individual parolees by an advisory board, the Conservatives insisting upon the inclusion of a member of the judiciary in case parole were misunderstood as an encroachment by the administration upon the traditional role of judges. Both reports reflected the fundamental consensus about the desirability of parole, which characterised the two major political parties, and which became more unmistakable in the succeeding discussions in Parliament: an indication of their ideological consensus on fundamentals that was part of the 'ideological hegemony' of the ruling classes in modern Britain.

The White Paper 'The Adult Offender'

In 1965 the White Paper, The Adult Offender, was published. Opening with the well known dictum of Paterson that 'you cannot train men for freedom in conditions of captivity' the paper put great emphasis on the need of society to strengthen the links between the prisoner and the free community and develop new ways of easing his transition back to freedom. It did not underestimate the importance of prison for the protection of society; what it emphasised was that prolonged confinement in

91. Ibid, p.30.

prison was very likely to lead to progressive deterioration. 'Long periods in prison may punish, or possibly deter them, but do them no good, certainly do not fit them for re-entry into society. Every additional year of prison progressively unfits them',⁹². Having said this, the paper proceeded immediately to outline the new measure of release on licence as 'the central feature of the Government's proposals', by which 'prisoners whose character and record render them suitable for this purpose should be released from prison earlier than they are at present',⁹³. It went on to say that 'prisoners who do not of necessity have to be detained for the protection of the public are in some cases more likely to be made into decent citizens if, before completing the whole of their sentence, they are released under supervision with a liability to recall if they do not behave',⁹⁴. Parole was, therefore, conceived as a measure of early release, under supervision in the community, of a selective number of prisoners, for whom further imprisonment was not necessary for the protection of the public or otherwise might be harmful to them.

Further on the paper mentioned that 'other countries have used systems of this kind with success and the Government have concluded that the time has come to ask for powers to adopt a system of early release on licence in this country',⁹⁵. Which were these 'other countries' was never elaborated upon, and

92. White Paper, The Adult Offender, H.M.S.O. London, 1965, para.1.

93. Ibid, para. 4.

94. Ibid.

95. Ibid.

given the great variety, as well as the great differences between the various systems, especially the American and the European ones, we would rather ignore this remark. It is of interest, however, to note the 'transplanted' optimism, as well as the wording of the last sentence, which gives the impression that the Government had never adopted any kind of early release before, which is totally incorrect.

Parole was envisaged as a selective process, but the bases upon which the selection was to be done were not clearly delineated. A general guideline was provided by the governmental paper that 'a prisoner's date of release should be largely dependent upon his response to training and his likely behaviour on release'⁹⁶. Furthermore, they suggested that 'release on licence would be limited to those who were likely to respond to generous treatment and who were not regarded as a risk to the public'⁹⁷. Furthermore, this measure would apply to prisoners who had shown 'promise or determination to reform'. The philosophical axis around which the new scheme was pivoting was expressed in the following often-quoted paragraph:

A considerable number of long-term prisoners reach a recognisable peak in their training at which they may respond to generous treatment, but after which, if kept in prison, they may go downhill. To give such prisoners the opportunity of supervised freedom at the right moment may be decisive in securing their return to decent citizenship (our emphasis)⁹⁸.

The ambiguities and dilemmas of this premise show the theoretical uncertainty with which the parole scheme was characterised from the very beginning. No clear idea was held about the

96. Ibid, para. 5.

97. Ibid, para. 6.

98. Ibid, para. 5.

length of the term of imprisonment referred to, neither were helpful comments provided about the notorious 'peak' in respect of who was to 'recognise' the 'right moment' or how this was to be done. The explicit assumption was that a kind of training was taking place in prison beneficial at first but after a certain, yet unknown, period likely to have deteriorating effects. The document suggested a Λ -shaped picture of the prisoner's response to training, although the criminological literature of the period had established a U-shaped pattern of the prisoner's attitudes towards what is called 'prisonisation'⁹⁹. In other words, it appeared that 'inmates tend to enter the prison with a relatively prosocial orientation, become progressively anti-social in their outlook into the middle phase of their sentences, but then undergo a further shift, back to conventional values, toward the end of their sentences'¹⁰⁰. In any case, assuming that training in prison takes place at all, the good effects in the short-run which become bad in the long-run can be explained only with the concept of 'cognitive dissonance' as R. Cross suggests¹⁰¹. The idea of 'peak' was not new in 1965. Almost fifty years before, in 1916 an American document suggested 'that the prisoner ordinarily arrives at a period in

99. For the concept of 'prisonisation' see Clemmer, The Prison Community, 1940. For the 'U-shaped curve' of prisonisation which cast doubt on the idea implicit in Clemmer that prisonisation was a linear process see St. Wheeler, Socialisation in Correctional Communities, Am.Soc.Rev., 26, 1961. For a plausible explanation of this curve see Stratton, The Measurement of Inmate Change During Imprisonment, unpubl. Ph.D. thesis, Univ. of Illin., 1963.

100. Hood & Sparke, op.cit., p.228. In Chapter 8 the impact of imprisonment and the various theories are comprehensively discussed.

101. R. Cross, Penal Reform in 1965 in Cr.L.R., 1966, p.191.

his imprisonment when further incarceration will be of less service to him and to the State as a reformative measure than a like period in liberty under parole supervision'¹⁰². Also N. Morris writing in 1951 about the habitual offender and release on licence for preventive detainees pointed out that 'the task is to select the appropriate moment for release; to capture possibly the one occasion in the habitual criminal's period of detention when there is a chance of his leading a life the community will tolerate'¹⁰³. It is obvious that to find the optimum point of releasing a prisoner on licence constitutes the crux of the paroling authority, but considering that no real grounds for its existence are provided and that some arbitrary limits are superimposed by the governmental document (to the effect that release on licence is possible only after one third of the sentence has been served or twelve months - whichever is the longer). Now, what about the possibility that such a peak or the optimal point falls in the last third (when the prisoner is generally out of prison with remission) or before the expiration of twelve months or one third of the sentence, when the prisoner is not eligible for parole anyway? Will the prisoner be allowed to go 'downhill'? Also, how could we assess the prisoner's 'likely behaviour on release'? By his response to treatment? But it was well known at the time that the behaviour inside the prison is a poor determining factor of a prisoner's future

102. Seventy-second Annual Report of the Prison Association of New York, 1916, p.72.

103. N. Morris, The Habitual Criminal, London, 1951, p.229.

behaviour. The Departmental Committee on Persistent Offenders had already reported in 1932 that 'by observing a man in the limited and artificial conditions of prison life, it is seldom possible to judge whether he is or is not likely to lead an honest life on release'¹⁰⁴. Also, by what criteria was the 'risk' to the public to be judged? This kind of question points to the ambiguous and contradictory character of the penal ideas formulating the policy of release on licence suggested by the government document. These same ambiguities and dilemmas are found in the system of parole as sanctioned by the Act of 1967¹⁰⁵.

There are still two important points regarding the functions of the parole system as expressed in the document. The first one is the potential of parole as 'the strongest incentive to reform'. The government knew that everything modifying the length of sentence was likely to affect very much the conduct of prisoners inside. Presented as a 'carrot', and rewarding obedience to prison rules parole would 'greatly assist the task of prison administration'. This potential, however, can be highly exaggerated, since the frustration and other feelings of those failing to be given parole is likely to create problems of prison discipline. The effect of parole on prison management as a whole is in fact more complex than

104. Report of the Dep. Committee on Persistent Offenders, H.M.S.O., 1932, p.58.

105. For a nice discussion of the major dilemmas of the modern system see R. Hood, Some Fundamental Dilemmas of the English Parole System and a suggestion for an Alternative Structure in D.A. Thomas (ed), Parole, Cambridge, 1974.

the document thought, and has been discussed elsewhere by K. Hawkins in all its aspects¹⁰⁶.

A second point, which is referred to in the very last sentence of the section on parole, relates to the potential function of parole as a means which 'would incidentally also go some way to relieve the existing overcrowding in prisons' (our emphasis)¹⁰⁷. We shall try to show in the following section that this function of parole was not incidental but one of cardinal importance for the penal system of England in the 1960s. Overcrowding in prisons being a chronic situation, parole could and should reduce prison population, particularly in the general local prisons which were badly hit by the increase of committals to prison. One must not again over-estimate the actual importance of parole in this matter because notwithstanding its great potential for reducing the prison population, the way in which the British system was envisaged and later implemented meant that this potential was never fully exploited.

The Conditions in Prisons in the 1960s

We have suggested above that parole was introduced in this country as an ideological product of the modern welfare state and as a pragmatic response to administrative difficulties in the penal institutions, especially overcrowded prisons. Before examining the ideological climate within which parole

106. K.O. Hawkins, Parole Selection, Ph.D. Thesis, Cambridge, 1971 and also K.O. Hawkins, Some Consequences of a Parole System for Prison Management, in D.J. West (ed), op.cit.

107. White Paper, op.cit., para.8.

was shaped in the 1960s we shall try firstly to explore in a more detailed way the second point concerning overcrowding, because the condition of the prisons in the years preceding the passing of the Criminal Justice Act provides one aspect of the background of the system. It will be shown that parole, along with other measures introduced by the Criminal Justice Act of 1967, aimed directly at the diffusion of the pressure from prison population which became more intense in the 1960s. Indeed, if we follow the trend for the prison population in the years after World War II we find that the average daily population in 1940 was 9,377, in 1945 14,708, in 1955 21,010, in 1960 26,824. In 1954 3,200 prisoners slept three in a cell intended for one, in 1955 2,160, in 1956 2,160, but in 1958 more than 6,000! The Prison Commissioners in all their reports made particular reference to these numbers, and in their report for 1956 expressed the fear that:

The effects of overcrowding on prison and borstal administration of this unexpected turn are already serious, and its possible projection into the future must be viewed with anxiety¹⁰⁸.

Looked at from a slightly different angle the following picture of prison population in local prisons, in relation to capacity, for the years 1956 and 1967 emerges¹⁰⁹:

	<u>1956</u>	<u>1967</u>
Capacity in General Local Prisons	10,041	10,621
Average Daily Population	10,718	14,779
% of capacity	106.7	139.1
Total capacity (local, open, closed)	18,157	23,247
Total average population	17,203	26,909
% of capacity	94.7	115.8

108. Prison Commissioners, Report for 1956, H.M.S.O. 1957, p.8

109. Taken from R. Sparks, Local Prisons, London 1971, p.13.

One can easily see that the conditions in the general local prisons were indeed deteriorating with respect to overcrowding. In the period 1956-1967 overcrowding in these prisons increased in percentage numbers from 106.7 to 139.1; in other words 39% of the prisoners incarcerated in 1967 were beyond the capacity of those prisons! Even if one includes open prisons, which were underpopulated in both years (1956: 76.9, 1967: 91.7) etc. the picture changes slightly, but again shows that in 1967, 15% of the average prison population were beyond the capacity of all institutions! There was, therefore, a pressure of accommodation in the years immediately preceding 1967, which the Criminal Justice Bill of this year, and the succeeding Act, tried to alleviate through specific measures. Suspended sentence was one of these new measures. According to the law, suspended sentence was obligatory for the Court in the case of a sentence of imprisonment for 6 months or less, and discretionary for sentences of 2 years or less. Other measures were: legislative restrictions on remands in custody, the freer use of bail, increased powers to fine offenders and modified fine-enforcement procedures so as to make imprisonment for fine defaulters much more difficult. We are not interested in the way these measures were used in practice in the next few years (in fact these measures failed to be easily accepted as integral parts of the penal system), but it is characteristic of the decarcerating potential of these measures that in the year of the implementation of the Act (1968) no less than 32,002 offenders received suspended sentences! Not all of them, of course, would have been sent to prison had they not been

given a suspended sentence, but a number of them would. In any case, the general context of the Act of 1967 suggests an effort at decarceration. According to a contemporary official document:

It has been the policy of successive Governments throughout this century to attempt to limit the number of people sent to custody and to encourage other effective ways of dealing with offenders. One of the main purposes of the Criminal Justice Act 1967 was to accelerate the shift of emphasis away from imprisonment¹¹⁰.

In the discussions on the Bill it was pointed out, however, by the then Home Secretary, Roy Jenkins, that the Bill aimed at reducing the number of people sent to prison 'not primarily because of the strain under which our prison system is suffering at the present time but primarily because I believe that it is a great mistake to acclimatise people to prison whenever it is un-necessary to do so'¹¹¹. He also said that 'the introduction of suspended sentence is not a question of administrative convenience. It happens that here administrative convenience marches alongside with what I believe to be a basically right approach'¹¹².

The effect of parole in reducing the prison population depends of course on the length of the imposed sentence. Taken that it applies to those serving sentences of 18 months or more it means that the greater the number of paroles in lieu of long imprisonments the greater the total contribution of parole in reducing the prison population. It is obvious that what

110. People in Prison, H.M.S.O. 1969, p.16.

111. House of Commons, Official Report of Standing Committee A, Criminal Justice Bill, 11th sitting, 22.2.67., Col.544-545.

112. Ibid, 14th Sitting, 7.3.67., Col.734.

matters here are not absolute numbers, but the contribution of each measure in the prison population as a whole. On the other hand, it must be always remembered that parole applies in practice only to almost 10% of those sentenced to imprisonment. In the same way, R. Sparks estimated that in 1967 nearly 33,000 receptions in the prisons were for 6 months or less and two thirds for 3 months or less, so that 'the total contribution of all these men to the average prison population at the end of 1967 was less than 6,000 in all', whereas only a 20% reduction of the effective length of sentences of 3-10 years would reduce the prison population by 300 men, and a 40% reduction by 600 men¹¹³. The discussions in both Houses showed that the government was not going to exploit to the full this potential, keeping in mind other considerations, and the Home Secretary repeatedly emphasised that he envisaged a situation where some 750 - 1,000 cases out of about 4,000 eligible cases every year would be reviewed by the paroling authorities and, of course, not all of them would be granted parole¹¹⁴. The succeeding phases of the parole system confirmed the original reluctant and cautious releasing policy¹¹⁵.

Parole and Penal Reform Bodies

The fundamental consensus regarding the desirability of a system of parole in the late 1960s becomes apparent when someone

113. R. Sparks, op.cit., p.75.

114. H.C., 26.4.67., Col.1647 and 1666.

115. As we shall see in the Epilogue the English parole board has been criticised for its cautious policy. But as R. Sparks observes, 'given the present pressure of numbers in the English prison system it is surely absurd to ignore the possibility of using release on parole to reduce the numbers in custody, especially in view of the utter lack of evidence to date that parole has any other

attempts even a cursory review of the ideas and opinions held by various penal reform bodies in British society. As we shall see in the following section these groups strongly supported early release on licence as a new measure of treatment, and differed only in secondary matters relating to technical and administrative problems of organisation, efficiency and rationalisation. The examination of the views of these diverse 'interested' groups is not carried within a 'pluralist' model of society, where various 'pressure groups' with supposedly equal power of every kind, are perceived as formulating penal policy, an assumption we have already criticised in Chapter 2. Rather, the views of law enforcement, religious and professional bodies, we are reviewing here, are taken as constituting components of a broad ideological hegemony, which cuts across such differences as religion, professional occupation, even political party loyalties. The fundamental consensus of almost all these bodies on the desirability of a parole system and its basic form is an index and a reflection of a wider consensus in penal matters dominated by the idea of 'treatment'. The Memoranda submitted to the Royal Commission on the Penal System constitute a good source of information, particularly because they are contemporary with the White Paper 'The Adult Offender', and because they provide the immediate ideological background of the Criminal Justice Bill (later to become the Criminal Justice Act, 1967)¹¹⁶. Therefore,

penological advantages'. See R. Sparks, op.cit., p.76.

116. Royal Commission on the Penal System, Memoranda submitted (in four volumes) and Minutes of Evidence (one volume), H.M.S.O. London, 1967.

we shall examine now the ideological climate within which the modern system of parole was shaped as an ideological product of the welfare state, and as an expression of the 'rehabilitative ideal' dominating British penal theory and practice at that period. We have already examined the 'pragmatic' and material reasons for the introduction of parole arising out of the specific conditions in the prisons of that time.

The Magistrate's Association was strongly in favour of a 'semi-determinate sentence', as they called it, then applied to young offenders, and they proposed that this sentence 'should be extended to adults and should apply to all sentences of more than six months, with a minimum and maximum fixed by the sentencing court'. They envisaged that the Parole Boards should be presided over by either a judge or a legally-qualified magistrate of wide experience, and should have among other interests represented in them a prison governor, a social worker, a psychiatrist and a lay justice. They considered that such a system would be a good way of eliminating the discrepancies in the sentencing policies of various courts and therefore would try to equalise punishments for similar offences¹¹⁷.

The Justices' Clerks Society was also in favour of greater use of parole and hostel systems 'in appropriate and carefully selected cases'. In their opinion such schemes seem to be a commendable way of instilling discipline, whilst at the same time allowing an offender to work to maintain himself and his

117. Ibid, Vol. II, p.18-19.

family, and of preparing himself for the responsibilities and pressures of full liberty'¹¹⁸.

A welcome was given to the 'imminent introduction of the parole system promised by the present Government' by the Society of Labour Lawyers. They warned, however, that in order for parole to succeed a great deal depended on the sufficiency and quality of after-care. They were well aware that 'probation officers are already overworked and underpaid, and immediate steps must be taken to strengthen their service'¹¹⁹. On their part, the National Association for Mental Health considered that 'the introduction of extended parole and home leave systems would make the whole prison system more flexible, and psychiatric staff could use parole and home leave as part of treatment. Present prison regulations tend to militate against treatment and rehabilitation'¹²⁰. They had in mind parole for sentences longer than two years. This they thought 'would prevent the deterioration which takes place when a prisoner is confined for a long period without any responsibilities, would be an aid to adjustment to the outside world and help to maintain his links with his family'. Finally, they singled out an advantage of parole which was unprecedented in the whole literature of parole and has never been found again, so far as I know, expressed as an explicit aim of parole. The Association being one for Mental Health they thought that parole 'would also lessen the temptation to homosexual activities in prison'!¹²¹

118. Ibid, p.35.

119. Ibid, p. 83.

120. Ibid, p. 168.

121. Ibid, p. 169-170

The Free Church Federal Council were also in favour of parole. They believed that 'no offender should be deprived of his liberty for longer than is necessary for his successful rehabilitation in society. More use could be made of the indeterminate sentence, with the possibility of parole under supervision held out to encourage the detainee in his training. This would be an effective instrument of discipline'¹²². In the summary of recommendations they again emphasised that 'the possibility of parole under supervision should be held out to all detainees for whom a lengthy period of confinement has been prescribed'¹²³. Another religious body, the Quakers, supporting the idea of abolishing short terms of imprisonment (less than 8 months) and considering 'after-care as the focal point of custodial treatment, thought that 'from the treatment point of view the length of a custodial sentence would be best determined by those responsible for the treatment programme' but they also felt strongly that 'the offender's right to return to the community as soon as possible has to be protected and a check made against abuse of power by the Executive'¹²⁴. They envisaged that in a reasonable maximum term imposed by the court 'the Secretary of State through his Prison Department, should have power to release a person at any time before the expiry of the sentence on such conditions as he thinks reasonable for the remainder of that term'. They were against 'the blanket allowance of one-third remission' and in favour of

122. Ibid, p. 216-217.

123. Ibid, p. 219.

124. Ibid., p.243.

'a system of selective release on parole'. Further exploring their proposals they suggested that the ultimate responsibility for parole should lie upon the Secretary of State through his Prison Department and its regional administration, that is why they recommended the setting up of Regional Advisory Parole Boards, as they termed them, for 'the avoidance of any rule of thumb application of parole rules'¹²⁵. The Boards should review every man's case at six-monthly intervals based on various reports. What is of interest is that they envisaged a situation where 'parole should be allowed at any time before the end of the maximum sentence imposed by the court' under such conditions 'in writing, in advance and accepted by the offender', which implied support for a wholly 'indeterminate' sentence.

Another slightly different view came from the Police Federation of England and Wales. As it was expected from such a body, they set high priority on the deterrent effect of punishment, without being hostile to treatment. Expressing their general penal philosophy they welcomed 'the more humane approach to the problem of crime' and the rehabilitation of the criminal, but they warned that they 'would not wish to see any policy of penal reform which did not clearly recognise the deterrent theory as the main objective of punishment'. They were somehow cautious about the suspended sentence, but they were 'very much in favour of the indeterminate sentence' and saw it 'as a more humane method of dealing with the criminal who is undergoing a long term of imprisonment, whilst at the

125. Ibid., p.248.

same time providing an effective means of protecting the public against his anti-social behaviour'. What is original in their proposals is that in their view if an Executive Body were appointed to grant releases, such a body 'having decided that the prisoner is sufficiently well fitted to once again take his place in society, we would not expect his freedom to be subject to any restrictive conditions',¹²⁶. But then comes the final comment:

Apart from the use of the indeterminate sentence as an effective means of dealing with long term imprisonments, we would not favour any system which empowered prison authorities to vary a sentence imposed by the judiciary. In our view the present provision under the Prison Rules of allowing a third of the sentence to be remitted for good behaviour is adequate to cover the case of the prisoner who makes favourable progress in re-establishing himself as a useful citizen. We consider the duration of the sentence should remain the responsibility of the Courts¹²⁷.

Their attitude towards parole seems ambivalent and, to say the least, not wholeheartedly friendly.

Another memorandum expressed views in favour of parole. The Association of Municipal Corporations proposed that 'as with the young offender it is necessary that the progress of a person sentenced to a term of imprisonment should be kept under review, particularly persons serving long sentences, as there will come a time with most long-term prisoners where the process of rehabilitation will stop and resentment and apathy grow',¹²⁸. They suggested that 'in addition to the provisions

126. This is quite extraordinary since it totally rejects the conditional element of parole. See R.C.P.S., Memoranda, op.cit., Vol. III, pp.6-7.

127. Ibid.

128. Ibid, p.21.

for remission of sentences, regular reviews might be held of long term prisoners, after say one-third of the sentence has been served'¹²⁹, and parole should be granted 'to selected categories of prisoners'¹³⁰. They justified their proposal on the assumption that 'an offender should not be without hope of a reasonably early return to the community if his response to training is satisfactory, and the prospect of release on leave would be beneficial not only to the prisoner but also to his family'¹³¹.

The Association of Prison Welfare Officers welcomed 'consideration of a parole system based on a more positive approach to the problems of resettlement on release'. They compared it with the 'negative' nature of remission, which 'may make men behave in prison but does nothing to encourage them to make proper plans for their own future'. They thought that such a facility should be available to all men in prison and that 'subject to satisfactory safeguards, prisoners should be released on proof of the availability of suitable permanent employment and accommodation'. An original suggestion was made to the effect that prisoners with a sentence of up to two years would become eligible for parole after having served half of their sentence. This time would be proportionately increased for those serving longer sentences¹³².

Another body which had favoured parole was the Conference

129. Something which was adopted by the subsequent Act.

130. And not to 'selected individuals'. This was the view, as we have seen, of A.C.T.O. and the Scottish A.C.T.O.

131, Ibid., p.21-22.

132. Ibid, p.121.

of Principal Probation Officers. They suggested parole for those sentenced to more than three years, through periodical reviews by a 'prison board and subject to the approval of the Secretary of State',¹³³. The supervision of parolees was to be undertaken by probation and after-care officers. On the other hand the National Association of Probation Officers were not so laconic as their principals and they dealt with parole in greater detail. First of all they thought that imprisonment 'must come to be used only as a deliberate and carefully chosen instrument in the treatment of offenders. To make possible the best use of institutions and staff for the training and treatment of prisoners, every effort should be made to reduce the numbers committed to prison'. They wanted prison to be used in a 'therapeutic manner' but they were aware that this sometimes might be hampered by a rigidity of sentence 'which may require an offender's release before he has been fully prepared for this, or his detention long after he could reasonably return to society',¹³⁴. Nevertheless, they felt that 'a maximum sentence should always be specified' to protect the prisoner from usurpations of authority, but within this maximum release on parole and under supervision should be possible at any time at the discretion of the Secretary of State. They would like to see the sentences of preventive detention and corrective training abolished. They saw parole as a 'logical development' in a flexible system of imprisonment. They suggested the establishment of Parole Boards by the

133. Ibid., p.137.

134. Ibid., pp.160ff.

Secretary of State, whose discretion would grant or deny parole in any particular case. He should take advice, especially from the prison in which the prisoner concerned is serving his sentence. A point of interest in their memorandum concerned the nature of parole:

We consider that prisoners should not be in a position to apply for parole, nor necessarily to know that their parole is under discussion and we consider it essential that no publicity should be given to the release of any prisoner on parole or to the fact that parole is under consideration...the Secretary of State should not¹³⁵ be subject to Parliamentary questioning or discussion¹³⁵.

Apart from the various 'assessment boards' in every prison they proposed a 'very small permanent national advisory board' which could keep under regular review the working of the parole system and see the development within it of patterns which might be used for guidance. But what impresses the reader of their memorandum is their philosophy regarding the function of supervision and conditions of parole. No mention is made of the 'reformative' or 'rehabilitative' importance of this phase, rather the emphasis is on the 'protection of society':

the public interest must be taken into account when release of any prisoner on parole is considered and that this must be protected by combining release on parole with statutory conditional supervision for a fixed, or if not fixed determinate, period after release with the possibility of recall by order of the court which passed the original sentence or any other court in case of a breach of any of the conditions of the parole or of a conviction for any further offence¹³⁶.

Finally, they were of the opinion that if parole were to be introduced the supervision of offenders released on parole

135. The logic behind these proposals is not clear. The discretionary power of the paroling authorities combined with the secrecy and mystery of parole decision-making might have made a tyranny of a parole system.

136. Ibid.

should be the responsibility of the probation service, as this service was experienced in the use of social work methods in dealing with offenders. They were willing to elaborate and further explore some of these points if they were asked to do so.

Parole and the Houses of Parliament

These were some of the proposals made by penal reform groups in relation to the introduction of the new system of parole. Not all of them were implemented, but almost all of them were underpinned by an implicit consensus about the desirability of such a system. Of course, the nature of these proposals as general frames rather than as detailed blueprints does not allow a more synthetic analysis of all these views. What interests us here is that so many diverse bodies agreed generally on principle, and in most of the cases on practical matters as well. Such a 'general consensus on fundamentals' was later to be observed in the case of the Criminal Justice Bill in the various readings and in both Houses. The opposition spokesmen admitted that they had not given political character to the discussion and when 'points of disagreement' were raised they were considered just as that. In the words of a front bench opposition spokesman:

Although on the whole we have had a very full discussion on the Bill, we have tried very much to keep the wind of party controversy out of the discussion, and sometimes we have almost flaunted our internal difficulties to achieve this desirable result¹³⁷.

In the House of Lords too, Lord Brooke for the Opposition

137. Speech by Mr. Hogg, H.C. Debates, 27 April, 1967, col. 1990.

underlined this consensus on fundamentals in relation to parole when he made the following statement:

I have no criticism whatever of the plan that there should be machinery of some sort under which suitable prisoners may be released on licence before what is now a man's earliest date of release, after two-thirds of his prison sentence...(our emphasis)¹³⁸.

No wonder, therefore, that a lot of time was spent in that House in discussing the proper name of the paroling authority under consideration, Lord Brooke suggesting that instead of 'Prison Licencing Board' other words should be found like 'Parole Board', in order to emphasise the independence of the Board from prison, others proposing other terms like Review Board or Central Review Board etc., the government insisting through Lord Stonham that the proposed scheme was not 'parole' in the traditional sense (word of honour for a short absence), and, furthermore, that this term 'parole' had 'American connotations', 'American flavour', which the government did not want any connection with. On the other hand, the American and Canadian systems were different from the one proposed here:

The Canadian and American Parole Boards have executive functions and thus themselves initiate releases. The Licencing Board will not have executive functions and will not of itself initiate the review of cases. It is not, therefore, a parole board. This being the case it would be wrong to call it one¹³⁹.

That the Board was finally called Parole Board is just one more ironic 'accident' in penal history.

From the general discussion in both Houses one gets the impression that the government introducing the Bill and the various participants in the discussions were very much confused

138. H.L. Deb., 12.6.67., Col. 718.

139. Ibid., Col. 723.

about the aims and objectives of the new scheme, as well as about its future operation within the whole penal system. The spirit of optimism was in the air, some particular criticisms were not lacking, but generally speaking no clear ideas about parole were crystallised in the debates. Both the Home Secretary in the Commons and Lord Stonham in the House of Lords pointed out that they did not want to see the Board as having 'too judicial a character', a judicial function. As the latter proposed in the House of Lords:

Its (Parole Board's) function will be administrative. It will not, in any sense try the case again. It has to reach a decision as to whether a man, if released is likely to be a good citizen, is likely to benefit from it, and is likely to benefit society as well¹⁴⁰.

This was a fundamental justification of the introduction of parole and in line with the general spirit of the White Paper. But then Lord Stonham suggested that they did not want to make supervision by a probation officer compulsory in every case, but only as a condition of parole, which was inconsistent with that spirit and the theoretical and legal attempts for an extension of compulsory after-care (including supervision and conditions) for a greater number of offenders¹⁴¹. The government showing inconsistency and uncertainty in this matter and finally accepting the importance of supervision and assistance after release, the criticism was launched that the better chance of success a man has and therefore the earlier he is released, the more supervision and help he will get after he

140. H.L., loc.cit., Col.729.

141. We shall consider these points in other sections below.

comes out, whereas those not granted parole (logically the worst cases) would get out without any assistance or help etc.¹⁴², something which looked to Lord Brooke as 'somewhat topsy-turvy',¹⁴³.

The answer was given in a way by Renton in the other House:

The object of the Parole Board is twofold. It is to ensure that our prison system is justly administered and is seen to be justly administered, but it also has the purpose of assuring the public that men are not let out of prison when they might continue to be a risk to the public¹⁴⁴.

The New Penal Measure

Some 'peripheral' objections notwithstanding, the Criminal Justice Bill passed the Third Reading in an atmosphere of complacency and euphoria. The Bill was given a warm welcome and was cheered as 'a significant contribution to the reform of our criminal law in that it will make it easier to convict the guilty while preserving the safeguards which we regard as essential. I hope too that it will give us a penal system which more closely related to the needs of our society',¹⁴⁵. The discussion on parole had re-affirmed the feeling of optimism prevailing in the government at that time. Lord Stonham assured the Lords that:

in collaboration with the Board we shall spare no efforts to make the licencing system a complete success in ensuring, as far as humanly possible, that the men the Board recommends for release on licence will be those who will benefit themselves and their families and society by such release¹⁴⁶.

142. Ibid, Col. 761 (Lord Hamilton)

143. Ibid, Col. 762.

144. H.C., 26.4.67., Col. 1665.

145. Ibid, 27.4.67., Col. 1987 (Home Secretary's speech)

And in another instance, responding to an answer by Viscount Dilhorne, he repeated the assurance that he 'as much as anybody and possibly more than anybody, hope that this Board will be a great success',¹⁴⁷. Whether this optimism was justified or not we cannot say at this point, but we can relate that this was perhaps an echo of the optimism prevailing at the pre-war and immediate post-war years in penological matters. An echo, and one of the last ones at that...

Eventually, the Bill passed both Houses and was written on the statute book. Parole was hailed as a 'radical innovation'. Local Review Committees were constituted, a bureaucracy was set up to deal with the new measures, the Parole Board was formed as an advisory body to the Home Secretary. A 'layman' was chosen to become its Chairman, a Lord and a world famous personality, Lord Hunt, totally unacquainted with penal matters. In his recently published memoirs¹⁴⁸ he recalls that he was required to come 'downhill' from another mountaineering expedition to hear the 'proposal' from the Home Secretary himself on the telephone. In another instance he recalled that 'as a parliamentarian who knew too little at that time about criminal law and penal practices I was persuaded of its potential prospects by the fact that the relevant clauses in the Bill were considered constructively by nearly all Members qualified to speak on this matter, irrespective of political allegiance',¹⁴⁹. In a year's time,

146. H.L., 12.6.67., Col. 731.

147. Ibid., Col. 734.

148. Lord Hunt, Life is Meeting, London 1978.

149. In the Prologue to D.J. West, The Future of Parole, London, 1972, p.7

he and his colleagues in the Parole Board were so triumphantly optimist that they reported:

Social reform is a continuing process but certain measures are seen in retrospect, to stand out as milestones on the main road of progress. As first members of the Parole Board we appreciate the opportunity to play our part in introducing this new measure of treatment for offenders, because we believe it will prove to be one such milestone¹⁵⁰.

It is an unhappy irony that the Prison Department reporting their work for the same year, more realistically and down to earth it seems, pointed out that:

It is not yet possible to assess the long term effects on the size of the population of parole and suspended sentences and those other provisions of the Criminal Justice Act 1967 designed to reduce the number of people sent to prison for short periods¹⁵¹.

One might say that both these quotations bear witness to the ambiguous and contradictory nature of parole, and both represent part of the explanation and the theoretical standing of parole, as well as the motives for its introduction here in 1968. It seems that 'treatment' considerations and 'reduction of prison overcrowding' were the basic *raison-d'etre* of the modern system of parole. In a recent paper Professor McClintock suggests that 'Parole in the United Kingdom had its immediate origins, or at least its justification, in the rehabilitative model...However, it has also been seen as a political trick to reduce the prison population without interfering with the sentencing powers of the judiciary'¹⁵². In an earlier work Martin Davies discussing the reasons behind the introduction of

150. Parole Board, Report for 1967, H.M.S.O., London, 1968, p.1.

151. Report of the Work of the Prison Department, London, 1969, p.2.

152. F.H. McClintock, The Future of Parole in J.C. Freeman (ed), Prisons Past and Future, London, 1978, p.125.

parole suggested that the arguments which carried weight especially in the Parliamentary discussions were somewhat confused. 'They represented a combination of humane idealism, a simplistic view of human behaviour and administrative concern about the pressure of numbers on the prison system'¹⁵³. The same author suggests that:

It must be concluded that the factors which ultimately carried weight were essentially administrative and political, despite the fact that officials went out of their way to deny that this was so. Parole should save money both in running costs and hopefully in capital development costs; careful selection procedures involve the minimum risk to the community in terms of recidivism, and the release of men must mean some relief on an increasingly overcrowded prison system¹⁵⁴.

One could reduce this argument to another which suggests a twofold justification: parole as a new measure of penal practice was essentially introduced as an ideological product of the welfare state in post-war Britain, with an eye to administrative advantages, particularly controlled reduction in the number of prison population for, primarily, fiscal reasons. Yet, since neither administration nor ideology exist in a vacuum, but constitute part of the main structure of a capitalist society, an attempt has been made in this chapter to examine parole and its objectives at a higher level of analysis and relate them to an examination of the modern monopoly capitalist state, usually called Welfare State, its place and function in society, as well as its deeper nature. Within this context, modern parole in Britain has been seen as an ideological expression of 'rehabilitation', which

153. Davies, Prisoner of Society, R.K.P., London, 1974, p.17.

154. Ibid., p.58.

reflected the basic attributes of the monopoly capitalist state as a state of increased concern with the welfare of its problem-populations, yet a state ridden with crises and contradictions, particularly fiscal problems and constant need for legitimation.

Conclusion

In this chapter we have examined the *raisons-d'etre* of the modern system of parole in Britain. We have suggested that parole was introduced here as an ideological product of welfarism and as a means of administrative expediency. We have also outlined some of the main functions of this penal measure for the criminal justice system as a whole and for the welfare state in the final analysis. More specifically, we emphasised the fiscal significance of the liberating element of parole and its contribution to the more efficient management of the penal institutions as a powerful incentive for good conduct, as well as the ideological function of the conditional-supervisory element of parole in depoliticising the nature of penal control, personalising the structural defects of the existing socio-economic system, mystifying the nature and purpose of prison in modern community, and thus legitimating state penal intervention. We shall return to some of these points in the chapter which follows and closes this work.



EPILOGUE



Summary

In the present work, three types of early release on licence were examined from a theoretical perspective based on a Marxist notion of penal policy, the capitalist state and capitalist social formation. Early release on licence was looked at as part of the wider penal control of the state, which in the last analysis constitutes class control in an inherently unequal and class divided society such as that under capitalism. The thesis that emerged from our analysis of penal policy is that no radical change in penal policy is possible without a radical reconstruction of the social context, every reform or modification in penal matters within an unchanged social structure providing a service to the existing status quo, either by rationalising or by re-adapting the system to meet new needs that arise from the defective operation of the economic and socio-political system in general. Only with a major change in the social structure is there any hope that the notion of crime, and therefore the need for punishment will 'wither away' together with the present capitalist state which constitutes them as instances of its repressive apparatus. As we have amply demonstrated, early release on licence has been historically bound up with other 'base-institutions' like transportation and prison, and this secondary ontological nature of early release on licence means that, although the fate of 'parole' necessarily follows the fate of the logically and practically preceding 'base-institution', the reverse is not necessarily true. It is obvious that even the abolition of 'parole' as a part of penal

policy, some minor practical implications for the penal system notwithstanding, is likely to only slightly affect the penal control apparatus of the state, and even more slightly the social structure of capitalist society. Although in the last years parole has been under increasing attacks, for reasons we shall explore in a following section, and in fact has been abolished in some States in America, such an abolition has to be seen as a 'reshuffling of priorities' within an intrinsically punitive system and as a 'rationalisation' or even 'liberalisation' or 'humanisation' of the penal control mechanism in an unchanged capitalist social formation¹.

Whatever the form and content of the penal control of the capitalist state, it constitutes, as we have already seen, a means by which the state secures the production and reproduction of the existing status quo, which in the last analysis is a complex of relations based on domination, exploitation, material inequality and material injustice. In this concluding chapter these general issues will be given a final touch, the present predicament and future tendencies of penal intervention and, specifically, of contemporary parole here and in America will be analysed, and the 'politics of abolition' of parole will be discussed. It is suggested that an effort at decarceration and penal control in the community might become more common in the future, but that prison might remain the core of the

1. The fact that not every abolition is motivated by 'progressive' thoughts is further exemplified in the case of Maine, which, first of all American States, abolished indeterminate sentences and parole, where these changes were in part prompted by a 'backlash against a liberal minded parole board' that was releasing up to 97% of the inmates who appeared for their first parole hearings. See Profile/ Maine in Corrections Magazine, 1, 1975, pp.13-26.

penal system as the last resort of elimination of 'dangerous' criminals, and for that reason more difficult to run. Although the future of parole is not at all bright, it is suggested here that under the present conditions in the penal system and in society at large, parole as an early release is preferable to an equal sentence of imprisonment without parole, as the things stand now. Another blueprint for an improved reconstruction of parole and the criminal or penal system of our society will not be attempted here to supplement those existing, since our efforts are not to legitimise the penal intervention of the state in capitalist society, but try to transcend the present social structure in search of a crime-free and punishment-free society, which will bring the end of penal control itself and all its paraphernalia.

Capitalism, State and Penal Control

In the second chapter we analysed the nature of the state in capitalist society and its crucial role in the maintenance and reproduction of the capitalist mode of production, while in the sixth chapter we specifically examined the capitalist state within the context of the modern mono poly capitalist (welfare-warfare) state, its crises, and their effects on future penal policy. To recapitulate: the state plays a significant role in the supplementation and accumulation of capital; it alleviates the most blatant inequalities, and it confronts various defects of the economic machine either by subsidising capitalists in difficult situations or by rationalising the conditions of private enterprise; it

helps in the formation and reproduction of the working class, as well as its mobilisation. At the political level, which 'overdetermines' all other functions of the state, it preserves the existing distribution of power and domination which is unequal; it helps the political organisation of the ruling class and the political disorganisation of the subordinate classes; and it has the monopoly of the legitimate coercive power within its territory, which in the last analysis is used in order to preserve the long term political interests of the ruling class. The monopoly of 'legitimate' coercion means that the capitalist state makes use of physical repression, yet one based on ideological consent. Through its own ideological mechanisms and through a special intervention at the ideological level the capitalist state tries to secure and re-inforce the ideological hegemony of the ruling class. The state is in a position to do all these, but at the same time is able to present itself as above classes through its 'relative autonomy' from the class that rules and the subordinate classes. According to recent Marxist theory, the state is not a subject endowed with will, neither is it a self-existent entity, but it constitutes a complex of relationships, the arena where the class struggle in our society is fought². The state is not directly an instrument of class domination, although it is so ultimately. This 'relative autonomy' of the state helps us explain why the state sacrifices particular economic interests of the rulers or part of them, or why it takes measures which are inimical to their short term interests.

2. See the various works on the State by N. Poulantzas and others referred to above in Chapter 2.

The capitalist state being the factor of cohesion of the social whole and the guarantor of its smooth functioning uses its repressive apparatus to suppress any challenge to the existing order, when any other means and particularly ideological manipulation have failed to ensure the undisturbed operation of the existing arrangement of socio-economic relations. Criminal law and penal policy through a complex interplay of repressive and ideological functions constitute an instance of the capitalist state where its power becomes clear and manifest. As we have already seen in detail elsewhere, crime and punishment are in the last analysis class issues, and, therefore, penal intervention, in whatever form, is in the last analysis an indisputable political act aiming at the suppression of the subordinate classes. However, the capitalist state through the special 'effect of isolation' we have described above, and through a particular utilisation of the dominant ideology has obscured the nature of crime and punishment and depoliticised their essence by individualising the social structural quality of these phenomena. The personalisation of social problems, common in many other problems of capitalism, has been exemplified in the case of crime and punishment in a specific concern with the criminal man which under the long sway of positivism led to 'individual pathology' on the one hand, as a cause of criminality, and to 'correctionalism' on the other, as a method of intervention. As we have seen, early release on licence in the form of ticket of leave had not been connected with a 'medical' model of criminality or a 'rehabilitative' model of penal intervention,

but all other cases we have examined, particularly the American and modern British examples, have justified early release on licence as an ancillary and logical development of the 'rehabilitative ideal' or 'reformation' or 'treatment', as it is usually interchangeably called, in contrast to the classical model of 'crime' and 'punishment'. We have suggested above that the classical notions of crime and punishment are closely connected with a laissez-faire competitive capitalism where the emphasis is placed on free will, private initiative, equality of all before the law and the state and a particular conception of the notion of 'political obligation'. On the other hand, 'individual pathology', 'treatment' and so on, as specific ideological justifications of penal intervention, have been certainly developed within a corporate type of capitalism and have well dominated penal policy when monopoly capitalism was safely entrenched in society.

The various types of capitalist state, or capitalist development, have not essentially changed the nature and fundamental contradictions of this mode of production. The relations of domination and exploitation of increasingly more people by a minority of capitalists still exist, and the central contradiction of capitalism between the socialisation of the productive forces and their private appropriation applies to monopoly capitalism as well, although the public sector at that phase of capitalism is larger than ever before. The surplus capital which monopoly capitalism produces enables the monopoly capitalist state to become a welfare state in order to alleviate the condition of the surplus population

which the same process produces and which leads to relative impoverishment and increasing proletarianisation of large sects of people. As we have seen, one aspect of modern capitalism is the fiscal crisis of the state which has important implications upon the formulation of social policy in general, and penal policy in particular. An attempt by the state to economise is evident not only in the imposition of essentially fiscal (fine) or cheaper types of punishment, but also in its increasing attempt to make the existing prison system as self-sufficient as possible. Early release on licence in all its types had a direct economic or fiscal aspect, either as a primary or as an auxiliary purpose. Modern Marxist theorists have pointed out that another fundamental crisis of modern capitalism is its 'legitimation crisis', a failure of the ideological mechanisms of capitalism to reproduce to the previous degree the consent of the people and the ideological hegemony of the ruling class, which implies that in the future the state will rely on its repressive apparatus for the maintenance of the existing economic and political arrangements to an ever-increasing extent.

What are the likely effects of these 'crises' of capitalist state - as the nodal point of the capitalist social formation - in the formulation of future penal policy in general? We could tentatively suggest that as far as the contradictions of capitalism are becoming more intense, the state in its turn is likely to intensify and utilise at the extreme both its ideological and its repressive mechanisms. At the law enforcement level such intensification is likely to involve

rationalisation, better organisation and modernisation of the repressive mechanism (use of science, modern paramilitary or military equipment, technologically advanced and sophisticated weapons and so on), as well as increasing surveillance of the whole population, through subtle methods and means, in the wider community. The increasing proletarianisation of wider sects of populations means that a larger part of people become 'suspect', although not actually 'dangerous', something which very likely will render policing in the community more pervasive and more diffuse, although not by sheer numbers of low echelon law enforcers (this only exceptionally, in situations of civil disorders), but by a whole network of invisible means of surveillance, culminating at a greater intrusion of privacy. The more the lower classes become politically aware of the weak foundations of capitalism the more ideologically alienated they will be from the dominant hegemony, the more the repressive apparatus of the state will be intensified, a fact that could well lead to what has been called a 'police state' or 'neo-fascist' state, or 'managed society'. As Ralf Miliband suggests:

The gradual transition of capitalism into socialism may be a myth: but the gradual transition of 'bourgeois democracy' into more or less pronounced forms of authoritarianism is not³.

According to another author:

A managed society rules by a face-less and widely dispersed complex of warfare-welfare-industrial-communications-police bureaucracies caught up in developing a new-style empire based on a technocratic ideology, a culture of alienation, multiple scapegoats and competing control networks⁴.

3. Ralf Miliband, op.cit., p.243.

4. B. Gross, Friendly Fascism, A Model for America, Social Policy, 1, 1976, p.46.

Repression and reform are likely to be not mutually exclusive but supplementary methods of the capitalist state in its attempt to solve the problems resulting from its operation. This reformative zeal will be more evident in the area of 'correctional' policy. Extensive use of criminological and penological research will be made especially regarding the effectiveness of particular penal measures, and greater funds for such research will be provided. The disillusionment with the effectiveness of prison to prevent recidivism combined with fiscal considerations as well as an ideological blurring between penal institutions and community may lead to a continuation of 'decarceration' in favour of community intervention, but on the whole prison is certainly to remain the core of the future penal system because of its eliminative capacity, at least temporarily, which renders prison an indispensable and convenient method of dealing with 'hard' and 'dangerous' elements. The change in the quality of the future prisoners, together with their increased politicisation, and the demystification of the 'treatment' rhetoric surrounding the operation of prisons might greatly reduce the ideological efficiency of prisons and make them more difficult to manage. Whether parole continues to operate as a later stage of imprisonment or not we shall see in a moment, but the functional significance of prison for the capitalist state, as an institution of absolute, although temporal, elimination of the strongest threats to the socio-political system, suggests that prison will continue to be an integral part of the future capitalist penal policy, as the last resort in a series of more subtle and community-based measures.

From what we have said above it follows that future penal policy in the capitalist state will continue oscillating between repression and reform in an effort to preserve and perpetuate domestic order, that is the relations of domination, exploitation and inequality between the ruling and the subordinate classes. The survival of capitalism through the double strategy of repression and reform and the ensuing reproduction of the relations of production which are basically oppressive would not eliminate the contradictions inherent in the system out of which the need to 'criminalise' and 'punish' is developed, and therefore would ensure that crime and punishment as means of class suppression are ineradicable from capitalist society. Only another kind of society, free of the fundamental oppressive nature of capitalism could be envisaged as 'crime-free', without need of repressive penal intervention; only the radical change of the present social structure could give rise to such a different kind of society.

The Future of Parole

Parole in the recent years has been under increasing attacks here and elsewhere, mainly the States and Canada. Its actual abolition in Maine in 1975 and the strong criticisms against its administration and its theoretical basis suggest that the future of parole may not be bright. In America, an influential report by some Quakers proposed the immediate abolition of parole in favour of fixed, determinate sentences⁵,

5. Quakers, Struggle for Justice, 1971.

while academic criminal lawyers have followed suit with popular⁶ and scholarly works⁷. The Governor of Illinois has favoured the elimination of parole from his state's correctional system⁸, whereas a Citizen's Inquiry in New York strongly disapproved of both theory and practice of parole at that state⁹. In Britain, parole has been under adverse criticism from its inception but some authorities recently began to question even its survival and came to recognise 'that the future of parole is problematic in the sense of uncertainty whether it will survive at all; it is not just a question of what form it will take in the future'¹⁰. What underpins almost all these studies, however, is their essential acceptance of the state penal intervention in society. They consider parole as one of many penal measures that failed to fulfil the objectives for which they were initially intended and did not live up to their expectations. In other words, parole has mainly been criticised as an irrational and arbitrary system that 'does not work', and which is based on fundamentally fragile assumptions. It is characteristic of the 'abolitionist crusade' that parole has been singled out as if it were an isolated moment of an otherwise rational, just and justified penal intervention and prison system, not

6. Schwartz, Let's Abolish Parole, Reader's Digest, Aug.1973,p.185.

7. N. Morris, The Future of Imprisonment, 1974(not outright abolition of parole).

8. Governor, Press Release, State of Illinois, Feb.18, 1975

9. Citizen's Inquiry, Prison Without Walls, N.York, 1975. For other abolitionist works see Stanley, Prisoners Among Us, Washington, 1976 and references in our review of the literature in Chapter 1 above.

10. Thus Prof. F.H. McClintock in The Future of Parole, in J.Freeman(ed) Prisons, Past and Present, London, 1978, p.123.

an index of the basic irrationality, oppressiveness and injustice of the penal system as a whole within capitalist society. In particular, not due consideration was given to the derivative ontological status of modern parole as an appendix to a sentence of imprisonment and as 'part of the general ideological mystification surrounding imprisonment',¹¹, and, therefore, to the effect that its elimination sought independently of prison, in a penal and social vacuum, is but an affirmation and legitimation of imprisonment and penal intervention in general.

Nevertheless, the numerous criticisms against parole here and in America must not be rejected outright as useless, since they are not formed from a radically critical perspective. They are significantly valuable for our work, particularly from two aspects: first, as immensely demystificatory exposures of the theoretical and practical defects of the system made from an 'inner position' and not from an enemy terrain, which increases their credibility effect and appeal to respectability for the official establishment, whereas if the same criticisms were made by radicals they might have been rejected as 'utopian' or 'anarchist', etc; secondly, they are taken to be a reflection of the permanent 'crisis' situation in the penal system of the capitalist state with the contradictions, dilemmas and ambiguities pertaining to it, as well

11. Schmidt, Demystifying Parole, Ph.D. Thesis, Univ. of Cal., Los Angeles, 1976. It is surprising in the case of Britain that the best characterisation of parole is found in a humble review of West's book, The Future of Parole, where Giles Playfair remarks that 'the parole system is just another smokescreen, cheap in itself but maintained with quite needless extravagance, to blind us to the need for a penal revolution', in New Society, 1, June, 1972, p.481.

as indices of the irrationality, oppressiveness, injustice and discrimination inherent in the penal system and the capitalist social organisation as a whole. In the following section some of the major criticisms of the concept and administration of parole will be outlined, as having informed past, and likely to inform future, discussions of a 'politics of abolition' of parole or as having been the basis for liberal piecemeal penal reform proposals¹².

One might say that our penological era is an era of transition from a debased 'rehabilitative ideal' to some neo-classical notions of crime and punishment. At least since the middle 1960s criminal theorists came systematically to question both the moral basis and the practical shortcomings of 'rehabilitation' or 'treatment' as a legitimate objective of dealing with offenders. They were quick to emphasise that rehabilitative programmes were essentially punitive because of their enforced character, which could lead to tyranny over the criminals without the legal safeguards of due process and proportionality of punishment to crime committed. As early as 1952 Lewis had warned about relevant dangers when he wrote from a wider perspective that:

12. These criticisms can be found in various works referred to above in the Review of the Literature (Ch.1). We have amply drawn from D.J. West (ed), The Future of Parole, London, 1972, D.J. West, Board on Parole, New Society, 15 June 1972, p.567, Articles on Parole, in Br.Jour. of Crimin., Vol.13, 1973, Hall-Williams, Natural Justice and Parole, C.L.R., 1975, p.82, 125; Morris & Beverly, On Licence, 1975. For the American systems the following works constitute excellent critiques of a more general importance: Citizen's Inquiry, Prison Without Walls, 1975, D.T. Stanley, Prisoners Among Us, 1976, Schmidt, Demystifying Parole, Ph.D. Thesis, Univ. of Cal., Los Angeles, 1976. For a good demystificatory discussion of Parole Decision Making see Macnaughton-Smith, Permission to be Slightly Free, Toronto Univ., 1976. See also J. Mitford, The American Prison Business, 1971, ch.12.

Of all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive...those who torment us for our own good will torment us without end for they do so with the approval of their own conscience¹³.

But it was Francis A. Allen, who in 1964 discredited with a short series of lectures 'the rehabilitative ideal' particularly for its procedural laxness and irregularity, its lack of due process¹⁴, its interference with individual values such as 'human dignity and human liberty' and its deceptive use of 'therapeutic' rhetoric where there existed only coercive punishment. Some years later similar concerns with social justice and human dignity led the American Friends to report that according to compelling evidence:

...the individualised treatment model, the ideal towards which reformers have been urging us for at least a century, is theoretically faulty, systematically discriminatory in administration and inconsistent with some of our most basic concepts of justice¹⁵.

With the questioning of the moral justifications of rehabilitation, and its repressive potential came the disillusionment with the capacity of penal institutions to attain this lofty ideal and prevent recidivism. The demise of the rehabilitation myth for the majority of penal theorists had its direct effects upon the indeterminate sentence and parole, which are two cardinal elements of the 'medical model' of crime and punishment, as we shall see in the following.

From a theoretical point of view parole has been criticised as being based on false or erroneous assumptions, in other words

13. C.S. Lewis, *The Humanitarian Theory of Punishment*, Res Judicatae, Vol. 6, 1952, p.224, 228.

14. F.A. Allen, The Borderland of Criminal Justice, Chicago, 1964.

15. Quakers, op.cit.

on the assumptions that rehabilitation is possible in prisons, that future conduct can be predicted, and that some 'experts' can assess the amount of rehabilitation achieved, something which at the present level of knowledge is not possible. From a more pragmatic viewpoint parole has been criticised as a decision-making process which is arbitrary and irrational, and as a supervisory measure which fails to achieve its goals either of surveillance or support. Furthermore, it has been seen as 'unnecessarily abusive and unfair', as 'cruel', as 'a tragic failure', as a measure 'which exemplifies our enormous capacity for hypocrisy' and 'demonstrates our enormous capacity for neglect'¹⁶, as a 'psychological thumbscrew, a con game', as 'the ultimate weapon of degradation that in fact all the emasculation the penal system so subtly exacts finds its culmination here'¹⁷. Finally, the critics emphasise the wide gap existing between rhetoric and actual operation of parole.

As we have seen, parole has been largely justified as permitting some rehabilitated prisoners to get out early at 'the optimum moment' of their rehabilitation. We have already noted that at present no such human capacity exists even between the 'experts', something which combined, as in the case of Britain, with statutory provision of minimum terms of imprisonment and other forms of early release renders the notion of 'optimal point' a sheer rhetorical mockery¹⁸. Since

16. Foreward by R. Clark to Citizens Inquiry, op.cit., p.vii

17. Berrigan, Widen the Prison Gates, N. York, 1973, p.142.

18. Summarising the major deficiencies of the work of paroling authorities D.T. Stanley observes that they 'are trying to do something which is impossible: predict the future behaviour of

assessment of rehabilitation and prediction of future conduct even by experts is not possible what is of interest, as regards Parole Boards, is not their professional status but rather their social class composition. Whereas here law has established qualifications for the Parole Board members no qualifications of expertise are required in the American systems. Nevertheless, the class background of these members is characteristically the same: overwhelmingly ruling class.

The class nature of penal intervention is well exemplified in the case of N.York, where since 1930 thirty nine persons were appointed as members of the Parole Board, eight of them as chairmen¹⁹. Of all these members only one was a black woman, only three were black males, only one Hispanic male; the remaining thirty four were white males! The first black was appointed in 1958, the first female (black) in 1972, while the only Hispanic in 1970. The Chairmanship has been held by a series of eight white men. The average age of the members in 1972 was over 58 years, only four resided in N. York City (two lived near the city), all others lived in far away suburbs. This contrasted to the fact that the prison

human beings. They are doing somethings that are not valid: basing decisions on the belief that prison training or therapy are effective. They are doing other things that are unjust: keeping people in prison because they may do something bad when they get out', op.cit., p.185. While another document summarised their criticisms in a few lines: 'In addition to being unable to fulfil its own goals or to fulfil an important alternative function, the operation of parole is oppressive and unfair. A crucial flaw of the parole decision-making process is its fundamental lawlessness', Citizen's Inquiry, op.cit., p.176. The Quakers write: 'At best, parole is an obstacle the ex-convict has to contend with among the many other obstacles in his path. At worst, it is a trap that when sprung intensifies his feelings of injustice toward the hypocritical, unpredictable rehabilitative system', op.cit., p.91.

19. For a discussion of this point see Citizen's Inquiry, op.cit., p6ff.

population was mostly under 30 years of age, non-white and from N. York City and indicates the extent to which the victims of penal intervention and its personnel are two worlds apart. The Citizen's Inquiry at that state did not pass over in silence the fact that 'political patronage' played an important role for these appointments which seemed to 'reflect considerations clearly distinct from merit or ability'! Moreover, the vast discretionary power they possess, the non-existence of appeal or review etc., make Parole Board there a body 'closer to despotism' than any other part of the criminal justice system²⁰. Much of this criticism applies to the British Parole Board as well, whose class-biased composition is secured by statutory provision²¹. As Professor McClintock observes the composition of the British Parole Board indicates a 'mixed approach' of expertise, principles of criminal justice and representation of the general public, the 'healthy, well-informed citizen'²². Thus a judge, a criminologist, a senior probation officer, a psychiatrist and such 'enlightened' members of the upper class, like headmistresses, retired senior police officers, past governors of prisons, 'businessmen' and 'retired businessmen', under the chairmanship of the penological innocence of a 'Lord'

20. Ibid, p.10,11.

21. Criminal Justice Act, 1967 provides that the Board shall consist of a Chairman and not less than four other members, and shall include among its members a person who holds or has held judicial office, a registered medical practitioner who is a psychiatrist, a person having knowledge and experience of the supervision or after-care of discharged prisoners and a person who has studied the causes of delinquency or the treatment of offenders. There were 16 initial members in 1968, doubled by 1977.

22. F.H. McClintock, op.cit., p.125.

or 'Knight', for reasons of vanity and surface respectability²³, try to arrive at decisions concerning a prison population which is overwhelmingly drawn from the lower and lowest classes of society. The fact that Parole Board here is only an advisory body and only one of a four-tier paroling authority (Local Review Committees, Home Office Parole Unit, Parole Board, Secretary of State) curbs some of its potential 'despotism', but its discretionary power is great nevertheless. What we said about the class-composition and discretionary power of the parole board applies to the L.R.C.s as well²⁴, which by their 'sifting' function can largely determine the flow of eligible cases to the Parole Board.

One of the main criticisms directed against parole everywhere is the lack of precise criteria for selection. In Britain no statutory criteria exist, but even in America where some legislatures provide some criteria they are so vague and abstract as to be entirely useless as guides for action. In New York for example the statute provides that parole will be granted only when 'the parole board is of the opinion that there is reasonable probability that if such prisoner is released he will live and remain at liberty without violating the law and that his release is not incompatible with the welfare of society'²⁵. In view of the vagueness of these

23. This has nothing to do with the real persons, of whom I hardly know more than their names, but refers to the ideological and mystificatory function of title and elite status in British Society.

24. For a long discussion on the role of L.R.C.s see J.P. Martin, The Local Review Committee, in West (ed), *op.cit.*, pp.32-57. He characterises the L.R.C. as 'a Parole Board in microcosm'.

25. N. York Correction Law 213 (McKinney Suppl.1973). The violation of law standard dates back to 1877 while the second standard was firstly included in 1928.

legal criteria the parole board have formulated their own everyday operational criteria which the Citizen's Inquiry found 'vague, complicated and inconsistent in purpose'²⁶. The British Parole Board have formulated a long list of criteria for release in relation to past, present and future conditions in a potential parolee's life²⁷, while the annual reports of the board state vaguely that 'each individual case is determined on its own merits'²⁸, which suggests that what criterion finally determined the granting or denying of parole is a real mystery, as no reasons for decision-making are given. These decisions have been criticised as 'largely subjective, and therefore difficult to justify and liable to unexplained inconsistency'²⁹. As it is expected, when the numberless criteria are reduced to two conflicting alternatives, one being the 'welfare' of the individual and the other 'the protection of society', parole boards side without question with 'society', as they have explicitly stated in their reports³⁰. Further criticisms concern the impromptu nature of parole decisions; the process of interview, the defenceless position of the potential parolee in that interview without legal

26. Citizen's Inquiry, op.cit., p.64.

27. Which in recent reports are put in the end of their report as an appendix, and which refer to such general categories as nature of the offence, criminal and other history, prison behaviour and response to treatment, medical considerations, home circumstances and employment prospects on release, co-operation with parole supervision. No categories of prisoners are legally excluded from parole consideration but as the Parole Board admitted certain categories of crimes, especially, some 'heinous or dangerously prevalent crimes such as peddling prohibited drugs, blackmail, hi-jacking of lorries, safe-blowing or large scale frauds' are prima-facie considered as non-suitable cases for parole. Here one must include cases of 'political' prisoners, like I.R.A. 'terrorists' etc. But in this way the gravity of the offence is taken into account for a second time.

28. Parole Board, Report for 1968, H.M.S.O., 1969, p.20 (para.50).

safeguards and due process, that is the lack of cross-examination, witnesses, counsel, the impossibility of examining the file, the lack of recording the discussion and so on, all of which point to the essential arbitrariness, caprice, secrecy and mystification surrounding the operation of the paroling authorities³¹.

Another aspect of the parole process which has been under criticism is parole supervision. Here, the failure of parole to serve 'God and Mammon', that is to realise the conflicting objectives imposed upon it has been emphasised. It has been pointed out that it is not possible in practice to attain protection of society through surveillance, and welfare of the parolee through casework assistance, help and friendship. Especially in some States the parole agent is simultaneously a law enforcer and a social worker, two professions that assumingly represent conflicting models of offender manipulation. As a policeman, the parole officer is armed and has authority to search the parolee, his residence or property, to impose and enforce further conditions, to impose curfew, to arrest without warrant and the like. As a social worker he has the duty to counsel and advise him and his family, help him with jobs and housing and try to attain parolee's 'readjustment' in society. As with the selection criteria of parole boards, here as well, as a matter of policy, the interest of community protection takes precedence over the interests of the parolee,

29. D.J. West, Parole in England in D.J. West (ed), The Future of Parole, p.20.

30. See for example Parole Board, Report for 1973, H.M.S.O., 1974, para. 49, p.17.

31. See works cited above.

something which points once again to the repressive nature of parole in the final analysis. As regards help the critics of parole agree that little is done for parolees to overcome the problems on release. The Citizen's Inquiry found in New York that each community supervising parole officer secured an average of half to one job for released parolees during the period of one year, although they had between 40-50 parolees in their caseload. They concluded that 'if the Parole Board really does consider employment a critical factor in the parolee's life the above statistics indicate that it is failing to live up to its beliefs'³². A British research similarly found that 68% of its sample had a job to go to on release or found one soon after leaving prison, and 'most did so through their own efforts'³³. On the parole supervision in general another American study concluded that parole officers seldom succeed in either of their conflicting assignments: policing the parolee to keep him from crime and helping him to resume membership in ordinary society³⁴.

The nature of conditions is another aspect of parole under severe criticism from liberal commentators. The parolee has been called 'a walking suspension of the Constitution' in America, since in various states he has no civil rights, to the extent that he cannot marry, drive a car, hold particular

32. Citizen's Inquiry, op.cit., p.87.

33. Morris & Beverly, op.cit., p.100.

34. Stanley, op.cit., 'Supervision for control' and 'supervision for support' as the Parole Board here call it.

jobs, etc. without permission. Apart from that, he is obliged to accept various other restrictions of movement, residence, and leisure'³⁵. Some conditions demand from the parolee that he 'lead a law abiding life and conduct himself as a good citizen' or 'to be of good behaviour' and 'lead an industrious life'³⁶, in other words they impose upon the parolee a heavier burden than that on other law abiding citizens, a fact which has been characterised as 'a relapse into the moralising tones of older legislation'³⁷.

Finally, the revocation process of parole has attracted some criticisms, particularly for the lack of constitutional safeguards (counsel, due process, judicial review etc.) of the revocation hearings, and the existence of wide discretion on the part of paroling authorities to enforce revocation of parole for technical reasons (violation of a condition). Considering that almost any activity could give rise to characterisations such as 'bad behaviour' with the ensuing possibility of revocation, it is evident that the parolee is under the sheer caprice of his supervisor. Furthermore, in some states the revocation of parole means that he is sent back to serve the unexpired term of his sentence, which sometimes is longer than

35. For a long list of conditions on parole imposed by California's Adult Authority see J. Irwin, Felon, 1970, Appendix

36. Notably there are no statutory conditions in Britain. For the standard conditions imposed by the Parole Board see their Report for 1972 H.M.S.O. 1973, Appendix 3. They include (1) Immediate report to the officer in charge; (2) acceptance of supervision; (3) keeping in touch with probation officer; (4) report of changes in address and job; (5) receiving of visits from supervisor and (6) good behaviour and leading of an industrious life. Further conditions may be imposed at the discretion of the paroling authority.

37. E. Shea, Parole Philosophy in England and America, in West (ed), op.cit., p.84.

the possible sentence for a violation of the law, not to speak of that for a technical violation. The statutory non provision of reasons for recall in the British system, apart from the commission of an indictable offence punishable with imprisonment, has been seen as a 'blatant violation' of the penal principle nulla poena sine lege, which is considered equally valid for administrative sanctions of a clearly punitive character like the revocation of a licence, and, therefore, parolees are seen as left without protection from unpredictable punishment³⁸.

Parole has been portrayed by the English parole board as 'a method of helping offenders become good citizens and as a consequence, of benefit to the community'³⁹. Many writers, however, have observed that if parole, as a penal measure, is so beneficial to the community it did not live up to its potential in practice, since so few prisoners are given it and for so little time⁴⁰. In recent years parole policy became more liberal, but as late as 1977 the majority of eligible parolees (52.5%) were not granted parole⁴¹. Taking into consideration that the 'better risks' among prisoners are those more likely to obtain parole, 'a major anomaly' in the system suggests that those in more need of supervision (either as a controlling or as a welfare mechanism) are not

38. E. Shea, op.cit., p.90

39. Parole Board, Report for 1969, H.M.S.O. 1970, p.38.

40. D.J. West, (ed), op.cit., p.22, where he observes the 'deliberate policy of caution' of the paroling authorities. See also article in The Sunday Times, Parole Board Too Timid Say Rebels, 11 June 1972. See also D.J. West, Report of the Parole Board for 1971, loc.cit., p.56 criticising the 'unduly conservative release policy' and the 'niggardly parole periods'.

41. See Parole Board, Report for 1977, H.M.S.O. 1978, App.3.

likely to receive it, and therefore will be released without it in the ordinary way. On the other hand, it has been repeatedly shown that parole period for the majority of cases does not exceed six months, which is considered not enough time for parole to have any effect on the parolee.

Not all the critics of parole are unqualified supporters of its abolition. Many of them think that parole could be improved to a more rational, liberal and fair process if the lot of their suggestions were implemented, not just closing their critical papers⁴². The more perceptive of them, however, are of the opinion that the essential weakness of parole lies in its dubious premises, so that no beneficial result could occur from a radical disorganisation of the system or allotment of greater resources. As D. Stanley remarks 'the problems of parole ... are problems of logic, concepts, acculturation, goals and methods, not of resources. Tripling the budgets, even if this were politically feasible, will not solve the problems'⁴³. Others suggest that because of its invalid premises, a reformed parole 'would not be significantly improved. Admittedly, it would be less oppressive and possibly more fair to the people under its control, but it would not be any more effective in doing what it intends to do'⁴⁴. Parole

42. See for example R. Hood, Some Fundamental Dilemmas of the English Parole System and a Suggestion for an Alternative Structure, in D.A. Thomas (ed), op.cit.; K.O. Hawkins, Parole Procedure: An Alternative Approach in Br.J. Cr., op.cit.; Morris & Beverley, op.cit., esp. Ch.11 (Parole: Some General Issues); West, Parole in England, in West (ed), op.cit., pp25ff (section: Suggested Improvements).

43. Stanley, op.cit., p.184.

44. Citizen's Inquiry, op.cit., p.167.

is seen as destined to failure:

The ineffectiveness of treatment and rehabilitation programmes combined with the problems of prediction strip parole of its basic justification. The role of a Parole Board releasing an inmate at 'the optimal point of his rehabilitation' is a myth. The assumption that the parole service reduces recidivism by helping the offender and protects the public by predicting criminality is unrealistic. Parole tries to do an impossible job and cannot succeed⁴⁵.

It is explicitly admitted that parole may be used for other objectives, like reduction of prison numbers or maintenance of prison discipline, or reduction of excessive sentences and so on⁴⁶. However, it is suggested that such functions could be better carried out by other parts of the criminal justice system rather than by such a costly and ineffective system like parole.

Conclusion

The main criticisms against parole outlined above signify that this measure is attacked from essentially two inter-related bases: firstly, from a broader critical stance towards the 'rehabilitative ideal' or 'treatment' as a justified objective of punishment, and a modern tendency among penal theorists to return to a 'retributive' or 'just deserts' model of punishment which favours fixed, determinate sentences and therefore leaves no scope for parole; secondly, from a liberal piecemeal reform stance which sees parole as an unsuccessful

45. Ibid., p.175.

46. West points out that 'so long as the granting of parole does not actually lead to an increase in crime, it can be justified on both humanitarian and economic grounds', West (ed), op.cit., p.21. He also listed 'better documentation' as a beneficial side-effect of parole! Ibid, p.24.

penal measure that does not live up to its expectations, that 'does not work' in practice, and that is rather an instance of irrationality, injustice, arbitrariness, caprice and oppressiveness within the whole criminal justice system, which is, because of this, impeded to effectively fulfil its purposes; a stance which although sees always the possibility of improvements and reforms is willing to sacrifice parole to the aims of the broader system of penal intervention if it proves itself beyond redemption. From either point of view, the elimination of parole does not at all, or only slightly, affect the basic affirmative stand these critics take as regards penal control in general and prisons in particular, a fact which, as we have suggested, renders almost all parole literature, either critical or abolitionist, a great legitimising factor of prison, as a cardinal element of capitalist penal policy, and of penal policy itself. Moreover, by examining penal policy as if it functioned in a social vacuum, liberal abolitionists cannot perceive that, even with the abolition of parole, with the collapse of the rehabilitative ideal, with the return to neo-classical notions of punishment as a retribution for past wrong committed and all the ideological re-allocations these concepts are implying, penal intervention is and will remain, in an unchanged capitalist social structure, an essential expression of the role of the capitalist state in preserving domestic order and maintaining the existing system of social, economic and ideological conditions, which in the last analysis works for the interests of the powerful over the powerless, of the dominant over the subordinate classes⁴⁷. After all it must

be remembered that parole, its theoretical and practical importance notwithstanding, comes at so late a stage in an offender's life that its abolition is perhaps capable of little good or harm, so far as the preceding stages of the existing criminal justice system remain unchanged. This has been realised even by such liberal documents as the Citizen's Inquiry, where it is suggested that:

To abolish parole because of its irrationality and harm and to leave the rest of the process as it presently exists would cause even more harm. With all its faults parole is not as destructive as imprisonment, and the possibility of release is preferable to the certainty of confinement⁴⁸.

This suggestion is valid as a statement of short-term policy, but mystifies the issues by posing a false ideological dichotomy between 'possibility of release' and 'certainty of confinement', which again works in a social vacuum. Penal intervention being a social phenomenon integral to particular historically determinate social formations, the important question to ask is, indeed, whether the elimination of the total penal intervention as a means of class oppression is possible and easy to attain. As we have tried to show above, in Chapter 2, under capitalism crime and punishment are inherent characteristics of the system, born out of the contradictions of the system and only susceptible to manipulation, not actual

47. Some criminologists, although highly critical of the criminal justice system to the point of ridiculing it (the shutting-up and letting-out game) miss the point when they insist that penal control and its measures are 'nasty devices' discovered or rediscovered by 'our professional annoyers' (police, judges, prosecutors, jailers, etc.) are 'aimless', 'objectively useless', 'without any objective benefit to society' and so on. See Macnaughton-Smith, op.cit., p.100,125, 128. The same author calls parole 'part of the official nastiness called contra-crime', op.cit., p.124.

48. Citizen's Inquiry, op.cit., p.xix

eradication. Only a radical restructure of the capitalist society could bring about a situation where the need to criminalise and the need to punish would not arise. As we have suggested, capitalism itself brings in its womb an authoritarian neo-fascist potential, if it is allowed to continue operating without radical change. This potential danger can be avoided by the continuous struggle for an alternative social organisation rid of the essential contradictions and oppressions of capitalism, a true, co-operative and equal socialist society. In recent years Marxist criminologists have envisaged such a society as the only society capable of being crime and punishment free. According to Quinney:

The underclass, the class that must remain oppressed for the triumph of the dominant economic class, will continue to be the object of crime control as long as the dominant class seeks to perpetuate itself, that is as long as capitalism exists. Only with a building of a socialist society will there be a world without the need for crime control⁴⁹.

The authors of the 'New Criminology' have also suggested that 'for crime to be abolished, then, social arrangements themselves must also be subject to fundamental social change' for the creation of a society 'in which the facts of human diversity, whether personal, organic, or social, are not subject to the power to criminalise'⁵⁰. The task facing criminologists is to work for human liberation, not to serve the mechanisms of oppression and domination in society. In the words of B. Krisberg:

49. R. Quinney, op.cit., p.16. See also the works of the Berkley Group in America (Platt, Schwendingers, Takagi, Krisberg, etc.).

50. Taylor, Walton, Young, op.cit., p.282.

Our common ground is the quest for social justice. It is crucial to understand that social justice does not mean that we all will become identical; rather the basic principles of a social structure should be respect for the human dignity of human life and the equal value of each individual. Practically, this means combating structures of institutional privilege and affirming the ideal of human liberation and self-determination⁵¹.

The radical praxis expected from us consists of a critical understanding and critical transcendence of the present, of critical thought and action, for the creation of a true socialist society.

51. B. Krisberg, Crime and Privilege, 1975, p.171.

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